(21,603.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 195.

CHICAGO JUNCTION RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM R. KING.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1910.

a At a regular term of the United States Circuit Court of Appeals begun and held at the United States Court rooms in the City of Chicago in said Seventh Circuit on the first day of October, A. D. nineteen hundred and seven of the October Term in the year of our Lord, One thousand nine hundred and seven, and of our Independence, the one hundred and thirty-second.

And afterwards, to-wit: On the fourteenth day of August, 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, the transcript of record, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM R. KING, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Mr. Frederick S. Winston, Mr. John Barton Payne, Mr. Silas H. Strawn, Mr. Ralph M. Shaw, Mr. John D. Black, Counsel for Plaintiff in Error.
Mr. James C. McShane, Counsel for Defendant in Error.

1 *Placita.*

Pleas in the Circuit Court of the United States for the Northern District of Illinois—Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Tuesday, the twenty-third day of June, in the year of our Lord one thousand nine hundred and eight, being one of the days of the regular December term of said Court, begun Monday, the sixteenth day of December, 1907, and of our Independence the one hundred and thirty-second year.

H. S. STODDARD, *Clerk.*

2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Be It Remembered. That on this day to-wit: the twenty-second day of July, 1907, come the Chicago Junction Railway Company, by its attorney and filed in the clerk's office of said Court, in the above entitled cause a certain transcript of record from the Superior Court of Cook County, Illinois, in the words and figures following to-wit:

Transcript of Record from the Superior Court of Cook County.

Placita.

UNITED STATES OF AMERICA,
State of Illinois, County of Cook:

Pleas, before the Honorable Axel Chytraus, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the first day of July, in the year of our Lord one thousand nine hundred and seven, and of the independence of the United States of America, the one hundred and thirty-first year.

Present:—

The Honorable, Axel Chytraus, Judge of the Superior Court of Cook County.
John J. Healey, State's Attorney.
Christopher Strassheim, Sheriff of Cook County.

Attest:

CHARLES W. VAIL, *Clerk.*

3 *Præcipe.*

Filed April 4, 1907.

Be it remembered that heretofore to-wit: on April 4th, in the year of our Lord, one thousand nine hundred and seven there was filed in the office of the clerk of the Superior Court of Cook County a certain præcipe which is in the words and figures as follows, to-wit:

Præcipe, Superior Court.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County, April Term, A. D. 1907.

WILLIAM H. KING, Plaintiff,
vs.
CHICAGO JUNCTION R. R. Co., Defendant.

Case. Damages, $25,000.

The clerk of said court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case to the damage of said plaintiff in the sum of twenty five thousand dollars, direct the same to the sheriff of Cook County to execute and make it returnable to the June Term of said Court, A. D. 190–

JOHN F. WATERS,
Plaintiff's Attorney.

To Charles W. Vail, Esq., Clerk.
Chicago, April 4, 1907.

And on to-wit: on April 4th, 1907, there issued out of the office of the clerk of said court the People's Writ of Summons directed to the Sheriff of Cook County to execute, which said writ with the sheriff's return thereon endorsed is in the words and figures as follows to-wit:

4 *Summons.*

Filed April 4, 1907.

Summons, Superior Court.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to the sheriff of said county, Greeting:

We Command you that you Summon Chicago Junction R. R. Co. if *he* shall be found in your county, personally to be and to appear before the Superior Court of Cook County, on the first day of the term thereof, to be holden at the Court House in the city of Chicago in the building S. W. corner Monroe and Clerk streets, now occupied as such, in said Cook County, on the first Monday of June next, to answer unto William H. King in a plea of trespass on the case, to the damage of said plaintiff, as it is said, in the sum of twenty-five thousand dollars 25,000.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Charles W. Vail, Clerk of our said Court, and the seal thereof, at Chicago, aforesaid, this 4th day of April, A. D. 1907.

[OFFICIAL SEAL.] CHARLES W. VAIL, *Clerk.*

Return to Summons.

Served this writ on the within named Chicago Junction R. R. Co. a corporation, by delivering a copy thereof to F. S. Winston, attorney & agent of said corporation this 5th day of April, 1907. The president of said corporation not found in my county.

CHRISTOPHER STRASSHEIM, *Sheriff,*
By L. A. BRUNDAGE, *Deputy.*

And afterwards to-wit: on the 27th day of April, A. D. 1907 a certain Notice was filed in the office of the clerk of said court in words and figures following to-wit:

5 *Notice.*

Filed April 27, 1907.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

16930—259,881.

WILLIAM H. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

To Winston, Payne & Strawn, Attorneys for said defendant:

Please Take Notice, that on Saturday the twenty-seventh day of April, A. D. 1907, at 9.30 A. M. or as soon thereafter as counsel can be heard, I shall, before his honor, Judge Barnes, in the room usually occupied by him as a court room, ask leave to be substituted as attorney for plaintiff in the above entitled cause, at which time and place you may appear if you see fit.

Dated, Chicago Ill., Apr. 26th, A. D. 1907.

JAMES C. McSHANE,
Attorney for Plaintiff.

(Endorsements on Back:) Gen. No. 259881. Term No. 16930. Superior Court of Cook County. William H. King, vs. Chicago Junction Railway Co. Notice.

Received a copy of the within Notice this twenty-sixth day of April, A. D. 1907.

WINSTON, PAYNE & STRAWN,
Att'y for —— ——.

And on to-wit: on the 27th day of April, A. D. 1907 a certain withdrawal and substitution of attorney was filed in the office of the clerk of said court in words and figures following to-wit:

6 *Withdrawal and Substitution of Attorney.*

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

Gen. No. 259,881. T. No. 16930.

WILLIAM H. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

The undersigned hereby withdraws his appearance as attorney for plaintiff in the above entitled cause.

JNO. F. WATERS.

The undersigned hereby enters his appearance as attorney for plaintiff in the above entitled cause.

JAMES C. McSHANE.

And afterwards to-wit: on the 21st day of June, A. D. 1907, a certain declaration was filed in the office of the clerk of said court in words and figures following to-wit:

Declaration.

Filed June 21, 1907.

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

Gen. No. 259,881. Term No. 16930.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Case. Damages $15,000.

Wiliam R. King, plaintiff, by James C. McShane, his attorney, complains of Chicago Junction Railway Company, defendant, of a plea of trespass on the case.

For that, whereas, the plaintiff alleges, that prior to and on to-wit: the 7th day of December, A. D. 1906 the defendant was possessed of

and operating a certain railway line, extending, among other places, through Chicago, Cook County, Illinois, and it was then and there a common carrier engaged in moving traffic upon and in connection with its said railway line between points in said state; and the plaintiff was then and there employed by the defendant as a switchman to switch with certain engines and cars which the defendant then
7 and there operated upon and in connection with its said railway line, and as such switchman earned, to-wit: $90.00 per month, and the plaintiff further alleges that at the time and place aforesaid, at, to-wit: the Union Stock Yards in said city, the defendant negligently, unlawfully and contrary to the statute in such case made and provided, hauled and used upon its said railway line and certain tracks connected therewith in moving traffic between points in said state, a certain car equipped with a certain automatic coupler, which said coupler, the plaintiff alleges, was then and there in such a defective, broken and inoperative condition of repair that it could not be coupled from the side of said car without the necessity of its switchman going between the end of said car and the car or cars to which it was to be coupled; and the plaintiff further alleges that it then and there became his duty to the defendant as such switchman to couple said car so equipped with said defective, broken and inoperative coupler, on to a certain other car then standing upon the same track and but, to-wit: a few feet from it, and as a direct result and in consequence of the said defective, broken and inoperative condition of said coupler he was then and there required to and did go between the ends of said cars for the purpose of repairing and adjusting said defective and inoperative coupler, so that said cars could be coupled together, and while he was so between the ends of said cars for the purpose and engaged in the work aforesaid, and while, as he alleges, he was exercising ordinary care and caution for his own safety said cars were then and there shoved together, and as a direct result and in consequence of his being so required to go and be between the ends of said cars as aforesaid his right hand and wrist and arm were thereby then and there caught between said couplers and cars, and divers bones, ligaments, muscles, tendons and membranes of his said hand, wrist and arm were thereby then and there crushed dislocated, broken and otherwise injured, and divers other bones of his body were thereby then and there dislocated, broken and otherwise injured, and he sustained serious shock and injuries to his spine and nervous system and serious injuries to divers of his internal organs, and as a direct result and in consequence of his said injuries he has ever since suffered and will continue permanently to suffer great pain, and his hand, wrist and arm have become and are permanently disfigured, crippled and otherwise injured, and he has become sick, sore,
8 disordered and incapacitated from attending to or transacting his regular, or any ordinary business or affairs, and he has thereby been and will continue permanently to be deprived of large gains and earnings which he might and otherwise would have made and acquired, and he has been compelled to and did incur, expend and lay out, and will continue to be required to incur, expend and lay out for medical attention, nursing, medicine, and

otherwise divers large sums of money, amounting to, to-wit: the sum of $3,000.00 in and about endeavoring to be cured of his said injuries, sickness and disorders, occasioned as aforesaid.

Second Count. And for that, whereas, the plaintiff also alleges, that prior to and on, to-wit: the 7th day of December A. D. 1906, the defendant was possessed of and operating a certain other railway line; extending, among other places, through Chicago, Cook County, Illinois, and it was then and there a common carrier engaged in moving interstate traffic upon and in connection with its said railway line, and the plaintiff was then and there employed by the defendant as a switchman to switch with certain cars and engines which the defendant then and there operated upon and in connection with its said railway line, and as such switchman, earned, to-wit: $90.00 per month; and the plaintiff further alleges that at the time and place aforesaid, at, to-wit: the Union Stock Yards in said city, the defendant, negligently, unlawfully and contrary to the — United States in such case made and provided, hauled and used upon its said railway line and certain tracks connected therewith in moving interstate traffic, a certain car equipped with a certain automatic coupler, which said coupler, the plaintiff alleges, was then and there in such a defective, broken and inoperative condition of repair that it could not be coupled from the side of said car without the necessity of its switchman going between the end of said car and the car to which it was to be coupled; and the plaintiff further alleges that it then and there became his duty to the defendant as such switchman to couple said car so equipped with said defective, broken and inoperative coupler, onto a certain other car then standing upon the same track and but, to-wit: a few feet from it, and as a direct result and in consequence of the said defective, broken and inoperative condition of said coupler he was then and there required to and did go between the ends of said cars for the purpose of repairing and adjusting said defective and inoperative coupler, so that said cars could be
9 coupled together, and while he was so between the ends of said cars for the purpose and engaged in the work aforesaid, and while, as he alleges, he was exercising ordinary care and caution for his own safety, said cars were then and there shoved together, and — a direct result and in consequence of his being so required to go and be between the ends of said cars as aforesaid, his right hand and wrist and arm were thereby then and there caught between said couplers and cars, and by means of the premises the plaintiff sustained and incurred the injuries, disabilities, losses, damages, pain, suffering and obligations described and set forth in the first count of this declaration, and to which said count, he here refers for a description of the same.

Third Count. And for that whereas, the plaintiff also alleges, that prior to and on to-wit: the 7th day of December, A. D. 1906, the defendant owned, possessed and operated a certain other railway extending, among other places, through the city of Chicago, county of Cook, State of Illinois, and into other states, and it was then and there a common carrier engaged in interstate trade and commerce upon and in connection with its said railway line; and the plaintiff

was then and there employed by the defendant as a switchman to switch with certain of its engines and cars which it then and there operated upon and in connection with its said railway line; and the plaintiff was then and there employed by the defendant as a switchman to switch with certain of its engines and cars which it then and there operated upon and in connection with its said railway line, and as such switchman earned, to-wit: $90.00 per month; and the plaintiff further alleges that at the time and place aforesaid, to-wit: at the Union Stock Yards in the city of Chicago, the defendant had and used upon its said railway line, in moving interstate traffic, a certain train of cars, and two of the cars in said train of cars, then stood upon the same track and but a short distance, to-wit: a few feet apart, and the defendant had then and there a certain engineer in charge and control of a certain switch engine which was then and there attached to one end of said train, and it then and there became and was the duty of the plaintiff to the defendant, as such switchman, to go between the ends of said cars so standing close together as aforesaid, and to there replace and adjust a portion of the automatic coupler upon one of said cars so that said cars could be coupled together, and he did then and there go between the ends of said cars for the purpose aforesaid; and the plaintiff further alleges
10 that the defendant's said engineer then knew, or by the exercise of ordinary care in that behalf would have known that the plaintiff was so between the ends of said cars for the purpose aforesaid, and that by means of the premises the reasonable safety of the plaintiff and the customary manner of doing said work required, it was then and there the duty of said engineer not to have moved or shoved said cars together until he had first given the plaintiff, by whistle signals or otherwise, warning of his intention to move or put said cars in motion and in sufficient time to enable the plaintiff to get from between said cars before they were so moved or put in motion, but the plaintiff alleges, that said engineer, not regarding his said duty, but in utter violation thereof, then and there wrongfully and negligently, and by means of said engine, moved or shoved said cars together without first giving plaintiff, by whistle signals, or otherwise, warning of his intention to move or put said cars in motion, in sufficient time to enable the plaintiff to get from between said cars, and as a direct result and in consequence thereof the plaintiff, through no want of ordinary care on his part, did not know or learn that said cars were about to be moved or put in motion and as a direct result and in consequence of said cars being so moved and shoved together as aforesaid, while he was so between said cars and engaged in repairing and adjusting said coupler so that said cars could be coupled together, and while, as he alleges, he was exercising ordinary care and caution for his own safety, and as a direct result and in consequence of his being so required to go and be between the ends of said cars as aforesaid, his right hand, wrist and arm, were thereby then and there caught between said couplers and cars, and by means of the premises, the plaintiff sustained and incurred the injuries, disabilities, losses, damages, pain,

suffering and obligations described and set forth in the first count of this declaration and to which said count, he here refers for a description of the same.

To the damage of the plaintiff of $15,000.00; wherefore he brings his suit, etc.

JAMES C. McSHANE,
Attorney for Plaintiff.

11 And afterwards to-wit: on the 2nd day of July, A. D. 1907 a certain petition for removal was filed in the office of the clerk of said court in words and figures following to-wit:

Petition for Removal.

Filed July 2, 1907.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 259881. Term No. 16930.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

To the Honorable the Judges of the Superior Court of Cook County:

Your petitioner, the Chicago Junction Railway Company, presents to this court its petition for the removal of the above entitled cause to the Circuit Court of the United States in and for the Eastern Division of the Northern District of the State of Illinois.

Your petitioner shows unto the court that the subject matter and the amount in said suit exceeds, exclusive of interest and costs, the sum of two thousand dollars; that said suit is of a civil nature, and is brought by the plaintiff against your petitioner, Chicago Junction Railway Company, to recover damages to the amount of fifteen thousand dollars ($15,000) which said sum of fifteen thousand dollars ($15,000) is claimed by the plaintiff to be due to him from the defendant, Chicago Junction Railway Company petitioner herein.

Your petitioner further shows unto the court that this petition is made and filed before this petitioner is required by the laws of the state of Illinois or the rules of this Honorable Court, before which said suit is brought, to plead or answer to the declaration of the plaintiff.

Your petitioner further shows that the declaration heretofore filed by the plaintiff herein consists of three counts; that in and by the second count of the declaration it is charged by the plaintiff that the defendant, the Chicago Junction Railway Company, was on the 7th day of December, 1906, possessed of and operating a certain railway extending among other places through the city of Chi-
12 cago, County of Cook and State of Illinois; that it was engaged in the operation of said railroad in the carriage and

movement of interstate trade and commerce; that the plaintiff was employed by the defendant as a switchman, and that it then and there became his duty to switch certain cars and engines used by the defendant in its said business; that the defendant, contrary to the statutes of the United States in such case made and provided, hauled and used upon its railway lines and tracks connected therewith in moving interstate traffic, a certain car or cars equipped with *a* certain automatic couplers; which said couplers were broken and defective, as a direct result of which the plaintiff was injured.

That in the third count, the said plaintiff alleges that the defendant was operating a railroad and engaged in interstate trade and commerce; that the plaintiff was employed as a switchman in operating said railroad; that the defendant had a certain engineer in charge of a certain engine; that it became the duty of the plaintiff to go between the ends of certain cars; that the said engineer knew, or should have known, that the plaintiff was in such position, but that wrongfully and negligently the said engineer moved said engine without giving warning so that the cars came together, as a direct result of which the plaintiff was injured.

Your petitioner further shows that the allegations of the said counts of the declaration are such that it appears therefrom that the question of the liability of your petitioner to the said plaintiff is one arising under the laws of the United States and that said suit is of a civil nature at common law where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, arising under the laws of the United States.

Your petitioner further shows unto the court that the question of the liability of your petitioner for the accident in question under the circumstances alleged in said counts is a question which your petitioner has the right to have heard and determined in the Circuit Court of the United States, in and for the Eastern Division of the Northern District of Illinois.

And your petitioner further files herein a bond with good and sufficient surety for its entering in the Circuit Court of the United States on the first day of its next term, a copy of the record in said cause, and for paying all costs that may be awarded by
13 said Circuit Court of the United States, if the said Circuit Court of the United States shall hold that this suit is wrongfully or improperly removed thereto.

And your petitioner prays that this Honorable Court proceed no further in said cause, except to make an order for the removal of said cause into the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois, and to accept such surety and approve such bond and cause the record in said cause to be removed to the Circuit Court of the United States in and for the Eastern Division of the Northern District of Illinois.

And this your petitioner will ever pray.

CHICAGO JUNCTION RAILWAY COMPANY,
By WINSTON, PAYNE & STRAWN,
Its Attorneys.

STATE OF ILLINOIS,
County of Cook, ss:

R. Fitzgerald being first duly sworn on oath deposes and says, that he is the vice president and general manager of the defendant the Chicago Junction Railway Company, in the above entitled cause, that he has read the foregoing petition and knows the contents thereof, and that the allegations thereof are true.

R. FITZGERALD.

Subscribed and sworn to before me this 2nd day of July, A. D. 1907.

[SEAL.] EDWARD C. MAHER,
Notary Public, Cook County, Illinois.

And on to-wit: on the 2nd day of July, A. D. 1907, a certain removal bond was filed in the office of the clerk of said court in words and figures following to-wit:

Removal Bond.

Filed July 2, 1907.

Know all men by these presents, that we, Chicago Junction Railway Company as principal and R. Fitzgerald of Chicago, in the county of Cook and State of Illinois as surety, are held and firmly bound unto William R. King in the penal sum of five hundred dollars $500.00 *dollars,* lawful money of the United States, for
14 the payment of which well and truly to be made, we bind ourselves and our heirs, executors or administrator, jointly and severally and firmly by these presents.

Whereas, Chicago Junction Railway Company principal above named has petitioned the Superior Court of Cook County in the State of Illinois for the removal of a certain suit therein pending, wherein William R. King is plaintiff and the said Chicago Junction Railway Company is defendant into the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now, therefore, the condition of this obligation is such, that if the above bounden Chicago Junction Railway Company shall enter and file, or cause to be entered and filed in the next Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division on the first day of its next session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the said —— Court of Cook County and State of Illinois, in which William R. King is plaintiff and Chicago Junction Railway Company is defendant, and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that said cause was wrongfully or improperly removed thereto, and shall also appear in said Circuit Court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the Act of Congress in that

behalf are required to be done upon the removal of such suit from said State Court into the United States Court, then this obligation to be void, otherwise of force.

Witness our hands and seals, this second day of July, 1907.

CHICAGO JUNCTION RAILWAY COMPANY. [SEAL.]
R. FITZGERALD. [SEAL.]
V.-P. C. J. Ry. Co.
R. FITZGERALD, [SEAL.]

Approved in open court July 3, 1907.

AXEL CHYTRAUS.

And afterwards to-wit: on July 3rd A. D. 1907 the same being one of the days of the July Term of the Superior Court, the following among other proceedings were had and entered of record in said court, to-wit:

15 *Order of July 3, 1907, Allowing Removal.*

Case 259,881.

WILLIAM R. KING
vs.
CHICAGO JUNCTION R. R. Co.

On motion of defendant's attorney and on filing petition and bond it is ordered that this cause be and is hereby transferred to the United States Circuit Court in and for the Northern District of Illinois, Eastern Division and that the clerk of this court forthwith transmit to said United States Circuit Court a full and complete transcript of all papers and pleadings filed herein together with all orders made and entered of record in said cause.

Certificate of Clerk.

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles W. Vail, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true perfect and complete transcript of the record in a certain cause lately pending in said court on the law side thereof, wherein William R. King was plaintiff and Chicago Junction R. R. Co. defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, this 15th day of July, A. D. 1907.

[SEAL.] CHARLES W. VAIL, *Clerk.*

(Endorsed:) Filed July 22, 1907, H. S. Stoddard, Clerk.

And on the same day to-wit: the twenty-second day of July, 1907, come the defendant in said entitled cause by its attorney and filed in the clerk's office of said court its certain plea in words and figures following to-wit:

16 *Plea.*

Filed July 22, 1907.

Plea.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. —.

WILLIAM H. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

And the defendant, Chicago Junction Railway Company, by Winston, Payne, Strawn & Shaw, its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said several supposed grievances above laid to its charge, or any or either of them in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country, etc.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

(Endorsed:) Filed July 22, 1907, H. S. Stoddard, Clerk.

And on to-wit: the tenth day of April, 1908, being one of the days of the regular December term of said Court, 1907 in the record of proceedings thereof in said entitled cause *appears* before the Hon. Kenesaw M. Landis, District Judge — the following entry to-wit:

Order of April 10, 1908.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RY. CO.

Now again come the parties by their attorneys and the trial of this cause is resumed. And thereupon the *plaintiff* enters its motion to remand this cause to the Superior Court of Cook County, Illinois, on the ground that no Federal Question is involved, and the Court, having heard the arguments of counsel upon said motion to con-

clusion and being now fully advised in the premises, overrules and denies said motion.

And thereupon a further examination of the jury is made when the hour for adjournment arrived, the further trial of said cause is postponed until Monday morning next at 10:15 o'clock.

17 And on to-wit: the thirteenth day of April, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District judge, appears the following entry to-wit:

Order of April 13, 1908.

Order of April 13, 1907—Called for Trial and Jury Sworn.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Now again come the parties by their attorneys and come also the following jurors, to-wit: Wm. H. Harrison, John Gilpatrick, J. H. Rogers, Chris Miller, J. G. Hutton, John Shaw, Louis Fortman, H. F. Buchholz, Theo. Farkeb, H. H. Moss, Fred A. Griggs and John Doolin, who are all duly elected, tried and sworn to well and truly try said issue and a true verdict render according to the law and the evidence,

And thereupon the opening statements of counsel being made and concluded, and a part of the evidence for the plaintiff being heard when the hour for adjournment arrived, the further trial of this cause is postponed until tomorrow morning at 10:15 o'clock.

And afterwards to-wit: the fourteenth day of April, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

18 *Order of April* 14, 1908.

Order of April 14, 1908—Evidence for Plaintiff Heard and Concluded.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Now again come the parties by their attorneys and come also said jury and the trial of this cause is resumed. And thereupon the evi-

dence in chief for the plaintiff being further heard and concluded, the defendant enters its motion to have the court instruct the jury to return a verdict finding the defendant not guilty, which is heard and overruled. And thereupon the further trial of this cause is postponed until 10:15 o'clock tomorrow morning.

And afterwards to-wit: on the fifteenth day of April, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Order of April 15, 1908.

Order of April 15, 1908—Evidence for Defendant Heard and Concluded.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Now again come the parties by their attorneys and come also said jury and the trial of this cause is resumed. And thereupon the evidence for the defendant being heard and concluded, the defendant renews its motion to have the court instruct the jury to return a verdict finding the defendant not guilty, which is heard and overruled. And thereupon the arguments of counsel are made, said jury are charged by the court and retire to deliberate upon a verdict attended by a sworn bailiff of this court. And thereupon it is ordered that if said jury shall have arrived at a verdict at a time when this court is not in session, said verdict may be signed, sealed and delivered to the foreman, to be returned at the next session of this court.

19 And afterwards to-wit: on the sixteenth day of April, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Verdict of April 16, 1908.

Order of April 16, 1908—Jury Return Their Verdict Finding the Issues for Plaintiff.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Now again come the parties by their attorneys and thereupon said jury return into open court their verdict finding the issues for the plaintiff and assess his damages against the defendant at the sum of nine thousand dollars.

And thereupon the defendant enters its motion for a new trial.

And afterwards to-wit: on the twenty-third day of June, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

Judgment of June 23, 1908.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Judgment of June 23, 1908.

Now come the parties by their attorneys; and thereupon the motion of the defendant for a new trial is heard and overruled, the defendant excepting and enters its further motion in arrest of judgment, which is also overruled, the defendant again excepting.

It is thereupon considered and adjudged, by the court that the plaintiff have and recover of the defendant his damages heretofore assessed at the sum of nine thousand dollars ($9000) together with the costs herein to be taxed and that execution issue therefor. And thereupon the defendant entered its motion for a writ of error
20 to the United States circuit court of appeals for this circuit and thirty days are allowed in which to file its bill of exceptions, and the bond on writ of error is fixed at the sum of ten thousand dollars ($10,000) to be filed within sixty days.

And afterwards to-wit: on the twenty-first day of July, 1908, there was filed in the clerk's office of said court in said entitled cause a certain Bill of Exceptions in words and figures following to-wit:

Bill of Exceptions.

Filed July 21, 1908.

Bill of Exceptions.

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Bill of Exceptions.

Be it Remembered that, on the trial of this cause, which occurred at the December Term, A. D. 1907, of said court, and before the Honorable Kenesaw M. Landis, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, sitting as Circuit Judge in this court, and a jury and which said trial commenced on Monday, the 13th day of April, A. D. 1908, and continued from day to day until the 15th day of April, A. D. 1908, all of which days were regular days of said term.

Appearances:

James C. McShane, Esq., for the plaintiff.
John D. Black, Esq., of Winston, Payne, Strawn & Shaw, for the defendant.

It was stipulated and agreed in open court by and between the parties to the above entitled cause, by their respective attorneys that the defendant, at the time of the accident, was a common carrier by railroad and possessed and operated a railroad extending from
21 the city of Hammond, in the State of Indiana, into around and about the Union Stock Yards, in the city of Chicago, and as such common carrier was at the time engaged in interstate commerce on and by its road; that the car in question was being used in interstate commerce and started from the Union Stock Yards, Chicago, Illinois, with a load, had gone to various points outside of the state of Illinois, and at the time of the accident was returning home empty; that the car in question was Armour Refrigerator Line No. 6189; that it was the second car from the engine in a train of 41 cars that were being hauled by an Illinois Central engine from Fordham, to the Union Stock Yards, Chicago, and 39 cars were behind it; that, up to the time it was delivered by the Illinois Central crew at about 1.20 A. M. of December 6th, 1906, the car showed no signs of being in bad order as to its draft timbers or running appliances in any way.

And thereupon the plaintiff to maintain the issues upon his part, testified in his own behalf as follows:

Testimony of William R. King.

Direct examination:

My name is William R. King, I am 38 years old; was born in Chicago and have lived here all my life. The accident occurred on the 7th day of December, 1906, at which time I was a switchman in the employ of the Chicago Junction Railway Company. Had been in the railroad business 8 years as car inspector, car repairing and switching service; had been in the switching service a year and a half for this Road, and never worked for any other road as switchman. On the day of the accident Theodore Shaw and Thomas Corrigan were members of the crew, Corrigan being conductor. I was the switchman who followed the engine, Shaw was the rear switchman, who worked in the field, and the conductor was in charge of all the movements and the men. Corrigan also occupied the position of assistant yardmaster. Thomas Walsh was the engineer, and the fireman's name was something like Novotny; it was a day crew. My work following the engine was to couple on the engine and to make all of the head couplings at the head end of the train, and to cut off cars at any time that the conductor gave me a signal. The work of the rear switchman Shaw was to line up the
22 switches and to catch cars if they were kicked too hard, or any such work as that. The crew was generally engaged in taking out loads, putting in loads taking out empties and putting in empties. I worked in the daytime, starting about seven in the morning and generally got through about seven or half past seven in the evening. The work of this crew was between 40th and 47th streets. The tracks along there they called the east and west main; there are only two short tracks running from 40th to 47th streets, little side-tracks all along to each loading platform. Other crews would come in there between ten and eleven o'clock in the forenoon.

Shows papers to witness, concerning which witness states: It is a substantially correct representation of that track that these cars were on, that the accident occurred on.

Counsel for defendant objects to the use of the paper containing outline of tracks and other lines which are labelled "Streets," on the ground that the same is of no probative value. Which objection was overruled by the court, to which ruling of the court the defendant by its counsel then and there duly excepted.

Exchange Avenue is a street coming in about 41st street east and west, through the Union Stock Yards. It is a pretty busy street, right through the Stock Yards. There was a flagman at the crossing, and the street south of Exchange Avenue is 42nd street, which is used for teaming. The next street is 43rd street and is about the same as 42nd. Next south of 43rd street two railroad tracks cross. One is the Armour Ice track, and the other goes to

Libby's, used to be the old Libbey plant. I got hurt about 600 feet north of Exchange Avenue. I have stepped it off. The distance between Exchange Avenue and 42nd street, is 300 feet. (Shows paper to witness). I have my own figures, 450 feet between Exchange Avenue and 42nd street and 400 feet between 42nd street and 43rd street. 300 feet between 43rd street and the Armour Ice track. There is a platform between the Armour Ice track and 44th street, known as the Lipton platform. The north end of that platform goes right up close to the railroad tracks. The cross tracks run east and west.

Counsel for plaintiff offers in evidence the said paper, and asks that the same be marked "Plaintiff's Exhibit A." Counsel for defendant requests that he be permitted to cross-examine the plaintiff concerning the said exhibit before the same is received in evidence, which request was allowed.

23 Cross-examination:

The paper does not show the south end of the yard at all, nor the souh connection of the track, nor any of the connections of the track. It does not show to the full extent the number of tracks that there are on this north and south track. The Line that I have here is simply designed to be a north and south line somewhere near the line that the tracks run north and south on, and the line of the curve to the north-east is simply designed to represent approximately what the curve is. It is not the exact curve. It is not scaled.

Counsel for defendant objects to the introduction of the paper in evidence, as not being of any value, and not being accurate; which objection was overruled by the court, to which ruling of the court the defendant by its counsel then and there duly excepted.

The said paper writing was thereupon received in evidence and is in the words and figures following, to-wit:

Direct examination (resumed):

The figures I have given are substantially correct. The accident happened on what they call the west main. That west main was used for storage; that is for trains and cars which were shoved in from the track. Sometimes they would stay there on hour; sometimes half an hour, sometimes two or three hours. There were two Chicago Junction crews who shoved the cars in there. The Ashland avenue yards are three quarters of a mile west of this point, and the Ashland Avenue crews put cars on this track three or four times a day. They generally shoved them down near the end of Exchange avenue. Usually they left them north of Exchange avenue. Sometimes they shoved them farther, if they had more cars. The morning I got hurt there were between 14 and 15 cars in this train. I did not count them. It was between 9 and 10 o'clock. This train had been standing on that track a little over an hour, and my crew was south of Exchange avenue about a block or may be two blocks. We had taken our cars there that morning and got

them all put away and got the loads all out, and got the empties all in; and there were other loads in this train, and empties that had to be set in on different platforms to be loaded and unloaded. Our engine went up after this train. We took no cars as we went back. The engine was backing up north, facing south.
24 Foot-board on each end. I saw Shaw and Corrigan up until Exchange Avenue. He dropped off his engine at Exchange Avenue and said he was going to take the numbers, and see where they had to be set. Shaw and I went back up to the switch. I was going north, on the east side of the train. There was another track parallel to us, called the east main, and we went back north and backed in on this west main. The tracks run east and west for a ways, at the point where we backed in. The engine was just about the curve, the cross-over that we came back on from the east main, to the west main was on the east and west track. When we backed in we coupled the engine on the north end. I stood beside a car that was down below a little ways, and there was another one, and Shaw gave a signal to go ahead, and I gave the signal to the engineer and he came ahead. Mr. Shaw walked down there, and I walked down there about a car length or so, from the engine, so that I could keep my eyes on Shaw. I was on the east side of the cars. It curves around to the west. I was right in there (indicating on paper.) I was on the west side, inside of the curve. Shaw walked down as far as the engine, and Corrigan was ahead there. That was six cars south of the engine. He gave a signal to back up, and I signalled the engineer of the engine to back up. I then climbed upon the second car from the engine and went up through this cross-over. I set the two brakes at the hind end of the sixth car down the Nelson Morris hay track. We then took four cars and went back again, to where we had come from, and I stood on the car next to the engine, a box-car refrigerator car. The entire string were all box-cars. I stood on top of the car next to the engine and Shaw was on the fourth car from the engine, the last car, the south car. Then he came down there, and Mr. Corrigan, the conductor, was there. As we shoved against them, the cars did not couple on, and he gave me the signal to back away a little bit. I gave the signal to the engineer, and he backed up and came ahead again. He back- away five or six feet. At that time I was standing on top of the car. They stood there and talked for a minute, and then Mr. Corrigan walked down to Exchange Avenue and Mr. Shaw jumped across the opening and walked one car-length, and then got down onto a car of coal onto the east side of the train, and walked down to Exchange Avenue south. Just as soon as they started, I walked down to see what was wrong. I walked down there on top of the cars, and saw there was a knuckle broken there. The tongue had been broken off I got down I
25 looked at it, and saw that I had one on the front end of the engine, just of the same kind. We carry knuckles, chains; pins or links or anything like that in a kind of sheet iron or sheet steel covering the front end of the engine. It is five or six feet across it.

Q. What is the fact as to whether or not you were accustomed to carrying those knuckles on the engine?

Counsel for defendant objects to the question on the ground that there is no charge in the declaration as to any custom of that nature. That it is made no basis for recovery in this suit; that it could not be material unless there was a charge of some sort relying upon that as a custom, or something that the defendant had held out, and that, as a matter of evidence, the defendant is taken by surprise.

Counsel for the plaintiff states that "Mr. Corrigan ought to have gone and got the knuckles there too, it seems to me, and they carry these things, and that is what it is for, it is a part of this case, this whole situation, that, when he found it was missing, he knew they carried them there, and he went up there after it."

To which statement and argument of counsel for the plaintiff in the presence of the jury counsel for the defendant excepted as improper.

The objection of counsel for the defendant to the question of counsel for plaintiff was overruled by the court, to which ruling of the court the defendant, by its counsel, then and there duly excepted.

We were accustomed to carry on the front end knuckles, links pins and chains. I had worked with that engine three months, and we had been carrying them all that time. Mr. Corrigan was about 60 feet south of this opening, when I last saw him as I went down there. When I went down there and discovered this thing he was at Exchange avenue. Exchange Avenue was about three car lengths from the south car of that train. There were twelve cars in the train after we set out the two, as I recollect, the whole train, I got off the west side of the car, on the inside of the curve, when I went down for the knuckle. There were some loaded coal cars standing on the adjoining track, west of these cars. There was a track parallel with the track on which this train stood, running around the curve in the same way. Between these coal cars and my coal cars I walked up to the engine. The knuckle was on the front end. I stepped up
26 on the foot-board, reached across and pulled the knuckle across to me, and then reached my left hand up and waved it like that (indicating), and the engineer saw it and looked right at me. I took hold of the knuckle and held it up and motioned like that (indicating). It was about 12 or 14 feet from the engineer's windows to the front end of the engine, where I stood at the time. I never measured the distance. The engineer was on the west side of the engine, which is his side. I then went down to the opening with the knuckle. I took the old piece out and took the old knuckle out and put the new knuckle in, and just as I reached around my hand to grab up the pin to drop in there, my hand was caught. The car north of me came against me. The knuckle I was repairing was on the north end of the south car, at the opening. This knuckle was on the north end of the south car. It was the car south of the opening. The cars to the north of the opening

were the cars that were shoved against me. I heard the blast of a whistle almost at the same time I was caught.

Q. What was the custom about blowing the whistle?

To which question counsel for defendant objected on the ground that there was no allegation or charge concerning any custom of blowing the whistle.

Counsel for plaintiff stated: "They do not blow the whistle when there is no reason to apprehend some one may be between the cars. This is with a view of showing the engineer did apprehend that. I understand it is not the rule to blow the whistle whenever the engine starts up. It is just a custom of railroading, ordinarily they do not blow any whistle, but if there is reasonable apprehension that a man be in there, they also toot the whistle. That is my understanding. That is why I want to show your Honor."

To which statement, in the presence of the jury, counsel for the defendant then and there duly excepted, and renewed his objection to the question propounded to the witness. Which objection the court overruled to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Such times as we would chain up cars, put a chain on a car put a link and a pin in a car,—anything like that, any little thing, like that, that we had to handle cars, before the engineer would start he would always blow the whistle if he was not sure."

Q. Was it or was it not the custom for the engineer to blow the whistle when he made every movement?

To which question counsel for defendant made the same
27 objection as was made to the preceding similar question. which objection was overruled by the court to which ruling counsel for the defendant then and there excepted.

A. He don't blow the whistle every time, but he usually did. Most of the time he did.

Q. What do you mean by that?

Which question was objected to by counsel for the defendant; which objection was overruled by the court to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Whenever we had hold of a string of cars at the crossing, down below these cars. There were so many teams passing there, it was customary for him to blow the whistle and ring the bell before he would start.

Q. Did you hear any bell rung before this car came?

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. No, sir. I could not get out until I hollered, and the train stopped. I don't know who stopped the train. It moved pretty near a car-length. I was on the east side of the drawbar or coupler, facing south, and walked along with the train. My hand was still

stuck into the coupler and I had to take hold of it and pull it out when the train stopped. The right hand was caught. I could not see to give signals from the east side of the train on account of the curve there, and these cars being in the way, extending around would not allow the engineer to see me. I earned about $140 a month at that time, from seven A. M. to seven P. M. and most every Sunday. I averaged $85 or $90 a month; sometimes $100.

Q. What was the custom, if there was a custom, among the switchmen on that road, and that crew as to what they do, when they discover a knuckle was broken?

Which question was objected to by counsel for defendant on the ground that there is no charge in the declaration of any violation of a custom in that respect. Which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. They would take a knuckle off the engine and put it in there so that they could handle the train.

One of these knuckles weighs about 30 pounds. I do not know whether they are cast iron or cast steel. (Witness steps in
28 front of the jury and exhibits his hand.) I can move the fingers very little. (Witness indicates.) I have a little motion in the first two fingers and the thumb, and no motion in the other two fingers. The other two fingers are hook like. (Witness exhibits elbow and moves and straightens as much as he could.) The wrist is entirely stiff. There is no motion there at all. I was taken to Mercy Hospital, and was there from the 7th day of December until the 13th day of April. The hand was hanging down like that (indicating) as soon as they took the bandages off, hanging at the wrist. Through the top of the hand here I could shove three fingers right down through there (indicating). They just took some water in a pan and washed it out the best they could. They gave me something; I did not know what it was. Dr. Andrews had charge of the case first. The first operation was to dress off the loose skin, and all the sloughing of the flesh. Such flesh as would slough off. That was four days after I went there. They operated again about a month afterwards. In the meantime there was a green pus or discharge from the hand, from the center and from the palm also. In the second operation they took and cut my side open here (indicating,) between three and four inches across this way, and about eight inches this way (indicating right side). And they cut that up and almost an inch of flesh, with the skin, and they put my hand in there, and sewed my hand in and bound it with a sort of sticky cloth. They left my hand there three weeks. Then they cut the strip off, leaving the flap that was grown fast to my hand by that time. That strip was large enough when they cut it for me to lay my left hand down in there level with the surface. It has bothered me since. They operated on it again about three weeks after that. I never marked the date. My hand was still running between the second and third operations. The third operation consisted of dressing this flap and sewing it down.

I went home on the 13th day of April, and the hand bursted open three times after I was home. It bursted in the palm of the hand and discharged pus. It has been about six months since it healed the last time. I had a doctor dress it up to that time. There has been no improvement in the motion in the hand since I left the hospital. My first work after this accident was for George H. Tucker. I took jewelry, gold watches, chains and rings and
29 sold them to the train-men. I started to work there after I had been at home about two or three months. May, June and July, along in the summer. I worked there six weeks and earned ninety dollars. I have not done anything since. I quit the jewelry business and started a small candy store at 26th and Halsted streets. The store is about 30 by 20 or 25 by 20. Just myself and my wife worked in the store. I carry cigars, tobacco, candy, hosiery, ladies' hosiery, men's hosiery, gloves and such like.

Q. Tell us now, in dollars, how much if anything, have you earned in the conduct of that store during all the time you have been running it?

A. I could not give it to you exactly.

Q. I mean, ahead of your expenses and all that. Have you earned anything?

A. No sir, nothing.

Counsel for defendant objected to the foregoing question and answer on the ground that the net earnings of the plaintiff were immaterial, and moved that the answer be stricken out. Which motion was overruled by the court. To which ruling of the court the defendant by its counsel then and there duly excepted.

My wife has been working with me in the store all the time. She does not get a salary. We both run the store.

Q. Can you not tell us now whether or not there has been any net earning or profit that you have derived from the conduct of that store?

A. No sir, I have drawn money out of the bank to put into the store, besides what I made there.

To which question and answer counsel for the defendant objected as immaterial; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

The COURT:

Q. How much is the stock worth out there now?

A. $700.

The COURT:

Q. What was it worth—when did you commence it?

A. I commenced last fall.

Q. What time last fall?

A. Some time in August.

Q. How much capital did you put in at that time?

A. $400.

Q. How much have you put in since?
A. $300.
30 Q. In cash?
A. Yes, $300.
Q. How have you lived? Where have you got your living?
A. We have made it from the store, and pretty nearly every month I have drawn fifty dollars from the bank.

Mr. McSHANE:

Q. That was from a fund that you did not earn in the store?
A. That is from a fund, from the Train-men, yes, sir.
Q. Anyhow, you did not earn it in the store?
A. No sir, I did not earn that in the store.

To all of which questions and answers counsel for the defendant duly objected as immaterial, at the time the same were propounded and given; all of which objections were overruled by the court at the time the same were made; to which rulings of the court the defendant by its counsel then and there duly excepted.

Cross-examination:

I railroaded four years for the Chicago Junction. For the four years prior to that time I was with the Lake Shore and Armour & Company. For Armour & Company I was a car inspector at the Union Stock Yards. Armour & Company's track or repair shops, where I inspected cars, were between 45th and 47th streets, right west of Halsted street about a block. It was on a different set of tracks than the one where I was injured. My duties as car inspector there required me to inspect Armour & Company's cars. They had freezers, beef cars and provision cars. I mean, refrigerator cars. I was hurt on a refrigerator car of Armour & Company and I became familiar with all the parts of Armour & Co.'s cars while I was an inspector. During those two years I did light repairing on the cars. Light repairing means replacing anything that can be done without moving the car off the tracks or going under it. That includes replacing of parts of the couplers as well as putting on hand holds and brake shoes and things of that nature. During the two years I was with Armour & Company, I replaced knuckles of the same nature as the one I was attempting to replace at the time I was hurt. The style of coupler on the car that injured me was an improved Gould patent coupler, one of the latest patterns of the Gould
31 coupler. It was a little heavier than the old Gould coupler. It looks something like a hook. That is, heavy on one side and light on the other. The hook is about four inches from the back to the front, and about eight inches from the top to the bottom. The hook is in the shape of a bulge or bulb at the heavy end, and the hook, instead of being a quarter turn hook, is almost a half turn, like a "U" shape. At the end of the "U" there is a hole through this knuckle, through which a pin passes, which holds it into the sleeve part of the draw-bar. The small end of the hook or "U" shape tapers down towards a point, and there it is about two or

three inches from front to back, and from top to bottom at the end it is two or three inches high. When the knuckle is in shape and the coupler and this pin are put into place and the knuckle is closed as it would be when cars are coupled together, this hook or knuckle is kept in place and kept from turning on the pin by what they call a lock, which is back inside the draw-bar somewhere. That lock stays on the outside of the knuckle when it is closed, of the tongue of the knuckle. That is, the small side of the "U," and is about four or five inches from the front face. The lock drops down in front or rear, on the inside of the "U" and keeps the thing from putting forward or out when a strain is put upon it. (Shows witness picture.) That is about the style of the coupler that I was attempting to repair, and about the style of the knuckle that I was using at that time. The break that I found was right across the tongue of the knuckle. That was the usual style of coupler that was there at the time. The Armour Refrigerator cars had other couplers as well as that kind. It was a first class coupler. It was a safety appliance coupler of that type. After I had inspected cars for Armour & Company for two years I became a car repairer for the Chicago Junction, which is the same company for which I was working at the time I was injured. I remained with the Chicago Junction as a car repairer for two years in the Stock Yards neighborhood. The car repairers worked in that part of the Stock Yards at 47th street, near Centre Avenue, which is south of the place where this accident occurred, and a block or two east, probably three or four blocks south and a block or two east. During the time I repaired cars for the Junction Company I did all kinds and all classes of repairing, heavy as well as light. Made repairs which had to do with making new
bodies of cars, put in new brakes, new couple appliances and
32 anything that was broken about a car. After that two years as car repairer for the Junction Company, I threw switches for the Junction Company at Ashland Avenue, right east of the Ashland Avenue yards. There are five tracks at that point. I threw switches there so that the trains as they came along would take the right track. I remained there about six months. Then I went to switching cars, and that is what I was doing at the time of the injury. I had switched cars for about a year and a half, and switched all over the Stock Yards. It is the custom to change a man from one crew to another, and send him anywhere inside of the Stock Yards, and I was liable to be sent any day to any part of the Yards. Just before the accident I had been switching with the same crew I was working with for about three months. We were all members of the same crew. The fireman had been changed about three weeks before the injury, but I had worked with the same fireman, and the same engineer and the same conductor and rear switchman for a period of three months, on the same engine. We worked up and down the Packingtown main track, so-called. The two tracks which are called the east and west main Packingtown tracks, on which our engine worked on the morning of the accident, run from 40th street to 47th street, 40th street is the north limit of the Chicago Junction tracks. The main track ends at 40th street, and the south limit of the Stock

Yards is at 47th street, about a mile across. There are only the east and west tracks and little subtracks, platform tracks. A quarter of a mile or an eighth of a mile west of these Packingtown tracks are the Horn tracks. The tracks known as the Horn tracks run from the north to the south yard, and the others were the Packingtown tracks, on which I was injured. East of them, about an eighth of a mile, are the Back Way tracks. These different sets of tracks were simply different switching divisions in there. During the three months that our engine worked up and down the Packingtown main tracks, it was our custom to come up from the south end of the Yards and to take cars which we found standing there on the west main Packingtown track, and shove them in south and to distribute them to different interests or to different railroad yards and different packing-house yards down in there. About three times a day we found cars at the north end of the Packingtown west main track, to be shoved in south and to be distributed in that way. Cars set in at the north
33 end of the Packingtown main track were never to be taken off in any other direction except to the south though sometimes we would find a car there that we would have to switch out. The great bulk of business was toward the south. It was not always our custom to run up the east Packingtown main track and run to a switch that connected the east and the west Packingto-n main tracks, up near 40th street, but sometimes we got hold of about seven cars and pulled back and came down on the east track. The engine usually worked from the north end. And when we did get onto the east track we had to shove down just the same way we had to shove down when we went down the west track. The only reason we would get over to the east track would be sometimes the west track would be blocked, and that would interfere with our shoving in that way. Mr. Corrigan had been assistant yardmaster as long as I had been switching there He also performed the duties of a switchman, in connection with this crew What he did as assistant yardmaster that was different from what he did as a switchman was to give instructions to the ten o'clock engine, which was a different engine that would come up in here and finish up the work at night It came in at ten o'clock in the morning, and Mr. Corrigan would tell us where to go. He did nothing else as yardmaster except to instruct the crew of that engine. He worked with our crew as a switchman and conductor and on switching work. He threw switches, cut off cars, made couplings and did the same work that Shaw and I did in connection with them. Exchange Avenue was a pretty busy street, and there were frequent movements of wagons and bus-es and of passengers back and forth across Exchange avenue, over these tracks. The Chicago Junction Company very frequently switched up and down, across Exchange Avenue. It was always customary, in going across Exchange Avenue, to give signals that the train was approaching. I was hurt about 600 feet north of Exchange Avenue; Corrigan was not on the engine He dropped off just north of Exchange avenue; he was south of the cars that were standing on the west main tracks when he dropped off, and was right close to them. Then he rode just over the crossing. It takes a second or two to ride two or three

car-lengths when an engine is moving. There was where he dropped off, and I was on the head end of the engine, on the front foot-board, and did not see what he did after he dropped off, because the
34 engine was going away and I was facing in the other direction. I did not know what his movements were from that time. The next time I saw him was when we came back with the four cars. I ran up past the point where I was injured, and went beyond them about twenty or thirty car lengths before I got to a switch. The point where I was hurt was on a curve. As we went past that point we kept to the curve, to the north-west. The curve does not curve all the way. There are about 25 car lengths there that are almost straight track, towards Packers' Avenue or the west. That was after we got clear around the curve. We ran clear around the curve, from the point where the accident was, and then went on a few car lengths to the west, until we came to the switch that let us in; and then we came back east and started going around the curve to the south-east, when we came in contact with these six cars. During the time that movement was made, I did not see Mr. Corrigan at all. I was not on the front foot-board of the engine as it shoved back into the south-east on the north end of these standing cars. As we shoved the first time, as we came in on them when we came in light, I staid on the front foot-board, and made the coupling. The engine was headed south, and I was on the front foot-board, as it went north on the east main. I was on the front end of the engine, headed south, but faced north, and made the coupling myself. At the time I made the coupling I could not see that the cars had opened up six car-lengths south of the engine. Mr. Shaw did not call my attention to the fact that there was an opening in the cars at that point. He simply gave me a signal to back up. I did not know at the time I made the coupling that there was any opening six cars away from the engine, Mr. Shaw was with me at the time I made the coupling onto the north end of this string of cars. He was about a car length ahead of me, on my side of the train, until I finished making coupling. It was on the west side of the train. On the west side of the track. After the engine came in contact he walked down the west side of the cars, in the space between these standing cars and the coal cars that were on the main track. Those cars were three or four feet apart, just a little bit more for a man to walk and let his shoulders clear. The coal cars were regular gondolas. They had sides about three feet high, some four feet, up from the platform of the car. They were loaded with coal. They were so close that I could not see back through the space on ac-
35 count of the curve. I could see about a car-length and a half down. Mr. Shaw had not gone south beyond the point where I could see him before he finally gave me the signal to pull north. He walked down pretty near to the opening. I could only see him about a car-length down the opening, and the opening was six car-lengths from the engine. He staid there about a car-length from me, at the time I coupled the engine on; then he walked on down further. I followed him down the space, just kept in sight

of him, walking away from the engine. I went about three car-lengths from the engine and stopped. I stopped because he gave me a signal to back up, and I walked back and gave the engineer a signal to back up. I did not know any reason why he had given the sign. At that time Corrigan was not in sight on the west side. I did not know what movement was to be made of the train at all. The engine backed up with these cars, over that switch that we had just come in on, and went down on the next track, and there was another adjoining track there that they called the hay track. We backed up probably 20 car-lengths, to this track. As soon as they backed up I got on the cars and could see we only had six cars. I did not know where the two end cars went in. I simply took the signals from Shaw, but had no talk with him. They were shoved into Nelson Morris & Co.'s hay-barn track. Shaw cut them off. I do not know that Mr. Corrigan was there at the time. I did not see him. The hay-barn track also ran back into the south-east and was parallel to the tracks that the cars had been standing on. That track went off the other way from the track that the cars had been standing on. It went off to the east, but got down close as it went around the curve a little distance. The distance across from where the cars had been standing to where we stood these cars was not very far. Probably a couple of hundred feet. It may have been a hundred feet, in a straight line across, but by way of these tracks that we had gone up and back, it was probably five or six or seven hundred feet. I staid right on the car next to the engine. After I got on the car, those other two cars were cut off. And then we backed up, getting our signals from Shaw all the time; and then we shoved down into the south. I stood on top of the first car after they came in contact with the cars standing. Was right next to the engine. The other cars were still standing at the point on the west main track. I did not notice any opening between the
36 cars immediately after they came in contact. That was the end car, the south of the cut that we were shoving in. I saw Mr. Corrigan standing down at the east side of the train. He was trying to make the coupling just before the cars hit. That was the last I saw of him until they came together. He staid right there I did not see the cars separate until they hit, and I did not know whether they separated or not. I could not see. I saw Shaw on top of the car, having some talk with Corrigan. He was at the edge of the car, and talking down to Corrigan. I could see Corrigan then I did not know what they were doing. They remained there in conversation about a minute. I staid on top of the car until Mr. Corrigan walked down towards Exchange Avenue. He walked on the east side of the train and kept right on going to Exchange avenue. I walked out to the edge of the car, so I could see where he was going. Sometimes he would walk down there to line up switches and sometimes Shaw would. One of them would always walk down south and line the switches up. That was the regular thing that he did. I did not know that was what he was going to do at that time. When Shaw left the place where I had seen him and Corrigan talking together, he jumped across the opening and walked one

car-length and jumped down onto a coal car. I saw him jump across. At that time I kind of thought there was an opening, when I saw him jump. That was the first I knew there was any opening there. Then he climbed down to where the coal car was. He got down on the east side of the train then, and walked down toward Exchange Avenue. He was clear down to the avenue the last time I saw him, still going south. I did not see him climb up at the end of the car at all. I did not see him any more after that. The last moment I saw him I was on the south end of the fourth car from the engine. I had walked down there during that time. When I got there I saw there was an opening and a break in the knuckle. That was the first I knew of it. Neither Corrigan nor Shaw nor anybody else said anything to me about it. I had no conversation with them at all. I climbed down on the ladder and looked to see what kind of a knuckle it was. I knew that I had one on the front end of the engine. I walked up on the west side of the train, to the engineer, to the front end of the engine rather, and took the knuckle from across. I had had the knuckle there for about a day. I had picked it up alongside of the track. I also had a Janney knuckle on there. That was a different type. There were
37 various different types of knuckles used. Of course a Jenney would not fit into this Gould coupler, and the Gould knuckle would not fit in any other sort of coupler, except an emergency knuckle. An emergency knuckle is one that is designed to fit temporarily into almost any sort of coupler, like a skeleton key. I had no talk with anybody as I took this knuckle off. The engine pump was working, making lots of noise, and there was a stock train pulling out and quite a noise there. The stock train was pulling out of Chute No. 10. That was east and north from me, about seven or eight rods. During the time I climbed down and examined this knuckle and walked up through that space, it probably took me three minutes. Then I took the knuckle off and started towards this place, and that took about three minutes more. During that six minutes I had not seen Corrigan or Shaw, and did not know where they were. And when I got back to the open space I was around the curve from where the engineer was, and could not see him, and he could not see me. I went into this open space and the engineer could not see the opening from his cab, neither could the fireman. The fireman was on the wrong side for that. I stepped into this place and was there just about three seconds. I found both parts of this broken knuckle in the coupler. The heavy part of the knuckle was not fastened in the coupler. There was a pin there, but no key to hold the pin. There was no wedge across the bottom, but the pin was there. The pin came off loose, I just took my hand and lifted it up like that (indicating), and pulled it right out and laid it on the lifting lever and shoved the other past it and set my knuckle in. I had taken the tongue out and shoved out the heavy piece in front before I moved the others. I took the tongue out before I went back for the knuckle. It was half way out when I looked at it and I just reached over and hit it and knocked it out. I had just set the other knuckle which I brought down from the

engine in there, and was reaching over to get the pin, as I was caught. The whistle whistled just about the same time that I was caught. I saw when the whistle blew. As I was caught I heard the whistle almost at the same time. I am not positive about the number of cars that were south of where the opening was. There may have been eight cars. That is my recollection. It was the custom there to blow whistles for those crossings before starting a train to move over them, and that was true any time of the day that we moved over the crossing. I know nothing at all
38 about how the break to this knuckle occurred.

Redirect examination:

Our train did not work by telegraphic orders or by schedule, or anything of that kind. When I was hurt the engine was facing more west than it was south West of it there were about thirty or twenty car lengths of straight track. There were no other trains to come in on that track at all at that time.

Q. What was the custom while you were working there, when a knuckle was found broken or light repairs necessary on these couplers, as to whether the repairs were made where the car stood, when they were discovered out of repair, or was the car run to some place else in order to make them?

Which question was objected to by counsel for defendant on the ground that it was not re-direct examination and it was not material or competent under the averments of the declaration, and that the declaration contains no averment relative to the custom herein sought to be proved; which objection the court overruled; to which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. We made such repairs so that we could handle the train right where the car stood.

When a man stands on the front platform of that engine these knuckles are so close to him that he can reach right over and pick one up.

Recross-examination:

We made such repairs as were necessary to handle the train. When we are shoving a car with an engine, and not pulling it we can shove the car just as well with the knuckle broken in the manner this one was as with a good knuckle. There were usually some knuckles at Lipton's platform, some distance south. They had been there all the time. I knew about that place. I knew it was a rule of the company that repairs to cars could not be made on the main track without setting signals.

39 Reredirect examination:

Q. What signals did you ever see set on this track when any little

Q. What signals did you ever see set out on this track when any little alterations were necessary in the coupler?

A. I never set out no flags.

Counsel for defendant objected to the foregoing question as calling for a conclusion; which objection was overruled by the court; to which ruling of the court the defendant, by its counsel, then and there duly excepted.

Q. What were the conditions if ever, when flags were ever used?

Which question was objected to by counsel for defendant on the ground that the question calls for a conclusion; which objection was overruled by the court, to which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. When ever they set out a flag that meant for the switching crew to be careful and not shove any car over that flag. There might be danger down at the other side of it.

Q. About making repairs, did they or did they not repair such little things as this on this track whenever they found them out of repair on that track?

A. Yes, sir.

To which question — for defendant objected and moved to strike out the answer thereto, on the groud that the question is too general, and because the witness has already testified about the knuckle; which objection the court overruled, and which motion the court denied; to which ruling of the court the defendant by its counsel then and there duly excepted.

Q. Which was the fact, Mr. King, as to whether or not, during all the time you were at work there they were or were not accustomed to replace a broken knuckle or make repairs of that kind on the track that this train stood on?

A. Yes, sir.

To which question counsel for defendant objected and moved that the answer thereto be stricken out; which objection and motion the court overruled; to which ruling of the court the defendant, by its counsel then and there duly excepted.

"Defendant's Exhibit No. 1 for Identification" Referred To.

And thereupon counsel for defendant requested that the photograph shown to the witness during his examination be marked for identification, and the same was thereupon marked "Defendant's Exhibit No. 1 for identification."

40 The Plaintiff upon being recalled further testified as follows:

Recross-examination:

I had two knuckles on the front end of the engine. At that time I did not have any emergency knuckle on there. At the time that my engine went north the east bound main track and passed by the string of cars, I did not notice whether there was any opening in

the string. (Hands witness picture.) The front of the locomotive shown in this picture is like the front of the locomotive I described yesterday. The engine we worked with was not like that. The space upon which the knuckles were carried is like that. It is the same as it was on our engine. From one side of the engine to the other, on the front timber, it was about six feet, and the iron plate was only about four or five feet from one side to the other, and two or three feet from the front of the plate back to where it came up against the solid supports of the boiler.

"Defendant's Exhibit No. 2 for Identification" Referred To.

And thereupon counsel for the defendant requested that the photograph shown the witness during his examination be marked for identification, and the same was thereupon marked "Defendant's Exhibit No. 2 for identification."

Redirect examination:

I have gone over the matter of the store since I testified yesterday. The money that I drew from the bank and put in the business is practically represented by the increased stock. I drew from the business for our living, to support ourselves, between $35.00 and $40.00 a month.

To which evidence counsel for the defendant objected on the ground that the same is not material; which objection the court overruled; to which ruling of the court the defendant, by its counsel, then and there duly excepted.

41 *Testimony of Fred F. Fair.*

FRED F. FAIR testified as follows:

Direct examination:

My name is Fred F. Fair; I am a physician and surgeon; I am a graduate of Northwestern University Medical School. I was at Mercy Hospital as an interne. While I was there Mr. King came under my care. He came in about 11:00 o'clock in the morning of Dec. 7, 1903, with a crushing injury of the hand. The skin on the palmer surface and this side of the hand (indicating) was all taken away, and the bones in the wrist joint had been opened up and slightly crushed and the bones in the hands had been crushed, and all the tendons on this side of the palmer surface of the hand had been cut, and the fingers were lacerated and cut and bruised, and the muscles on either side of the hand were all cut and mashed up. He was taken to the dressing room and his injuries were dressed and allowed to remain that way I think three or four weeks, with redressing every day, until the dead part of the hand had come away. Then it was three or four weeks when the tendons that could be united were united on the palmer surface and dorsel sur-

face of the hand. A flap was made in the abdomen, cut in, and his hand was put into that and the edges of the skin were sewed to the edges of the cut skin on his hand, and that was allowed to remain in there and was dressed every day, and following that in one of his bad spells he tore that out and that had to be re-operated. He tore the stitches loose and tore the hand out of that pocket, the pocket that had been made in the abdomen. It was done unconsciously. He suffered quite a good deal of pain. That was done over again, in about two or three weeks it was cut away. He was given an anesthetic each time, and that was cut away and the edges of the skin were trimmed up and a better job was made than could be made in the abdomen, with the hand in the abdomen. The second time the hand was put in a flap we put a large plaster of Paris cast over his arm and around his body, to hold it in there so that he could not get his hand out. That was good surgery. During the time he had the cast on he had an abrasion on the surface of the elbow. The skin was rubbed off, and that became infected, and the matter got into his elbow joint, and that made his elbow joint partly stiff. He has got about a quarter of the motion in his elbow joint
42 that he ought to have. I think this condition is permanent. He cannot raise his hand to his face. He cannot feed himself with that hand. He has slight motion in the first finger, some in the second, and a little in the thumb, but he cannot bring those together very well. It is an impaired motion of the finger. He has no motion of the little finger, and in his next finger absolutely none. He has no motion in the wrist joint. He is unable to move the wrist joint because it was opened up at that time, and the bones grew together, which it was impossible to prevent. The two fingers (indicating) in which he has no motion are partially extended. He cannot open them up at all. They are flexed. In the other two he has some impaired motion. He has very little motion in them. They are also crooked. There is a deformity in the appearance of the hand. It looked crushed; it is flexed at the wrist. The big fat surface is the piece of skin that we took from his abdomen. It will always remain that way. The appearance of the hand will always be as it is. I do not think it will ever improve.

And thereupon counsel for plaintiff and defendant stipulated the facts to be that Corrigan signalled Shaw to back up the train, which signal Shaw transmitted to the engineer, who did back up the train in obedience to those signals, immediately preceeding the movement, and the signals were given for the purpose of bringing about the motion, and that the signals were all given after Corrigan had learned of the defective condition of the knuckle.

And thereupon the plaintiff rested his case.

Motion of Defendant.

And thereupon the defendant, the Chicago Junction Railway Company, at the conclusion of the evidence offered by and on behalf of the plaintiff in said cause, moved the court to dismiss the second

and third counts of the declaration of the plaintiff, on the ground that the Act of Congress of the United States entitled "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes." approved March 2, 1893, amended April 1, 1896, and the Act of Congress of the United States entitled "An Act to amend and Act entitled 'An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate
43 commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes' approved March second, one thousand eight hundred and ninety three, and amended April first, one thousand eight hundred and ninety-six," known as the "Safety Appliance Acts," in so far as they seek to prescribe and regulate the equipment of freight cars were in violation of the Constitution of the United States and unconstitutional and void, because to prescribe and regulate the equipment of freight cars as prescribed by said Act is not a regulation of commerce among the several state.

Which motion was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

Instructions Asked by Defendant.

And thereupon the defendant, the Chicago Junction Railway Company, at the conclusion of the evidence offered by and on behalf of the plaintiff in said cause, moved the court to instruct the jury to find the said defendant, The Chicago Junction Railway Company not guilty, and the said defendant presented to the court its instruction in writing, and asked that the same be gvien as follows:

"The court instructs the jury to find the defendant, The Chicago Junction Railway Company, not guilty."

Which motion the court overruled, to which ruling of the court the defendant, by its counsel then and there duly excepted.

Whereupon the defendant, to maintain the issues upon its part introduced and presented the following evidence:

Stipulation.

It was stipulated and agreed by and between the parties to said cause, by their respective attorneys, that the car inspector of the Chicago Junction Railway Company inspected the train of cars of which the Armour Refrigerator car in question was one, in the Ashland Avenue yards of the Chicago Junction Railway Company, which have been testified to by the plaintiff as being some three-quarters of a mile distant from the point of this accident, and that the inspection was made at about four o'clock in the morning of December 6th, and the accident occurred on December 7th. That at that time the inspector examined, among other parts of the car,

the couplings in order to see if they were in proper order. That he so tested the couplings by pulling the levers in passing
44 the cars to see if they were working properly, and that he at that time discovered no defect about the couplings; that the number taker, whose office was in the Ashland Avenue yards, and whose duty it was to take the numbers of each train of freight cars that went out of that yard, for the purpose of keeping a car record of their movements, took a car record of this train at nine o'clock in the morning of December 7th the day of the accident, as the train was being shoved out of the yards by an engine, under the charge of Conductor Boland. That at the time the train was in motion, coming down towards the yard where this accident occurred, being pushed by an engine from the west, there was consequently no break or opening at any part of the train.

Defendant's Exhibit No. 1 for Identification.

And thereupon the defendant by its counsel offered in evidence on behalf of the defendant, the photograph concerning which the plaintiff testified, and which was identified by the plaintiff and marked "For Identification, Defendant's Exhibit No. 1" and requested that the same be received in evidence and marked "Defendant's Exhibit 1" which was accordingly done. Said exhibit is in the words and figures following, to-wit:

Def't's Ex. No. 1 for identification. C. P. D.

* * * * * * *

(Endorsed:) Photographer 423 W. 63rd Street. This Photo taken Dec. 8—1906 By G. W. McWhinney.

Defendant's Exhibit No. 2 for Identification.

And thereupon the defendant by its counsel offered in evidence on behalf of the defendant, the photograph concerning which the plaintiff testified, and which was identified by the plaintiff and marked "For Identification, Defendant's Exhibit No. 2" and requested that the same be received in evidence and marked "Defendant's Exhibit 2," which was accordingly done. Said exhibit is in the words and figures following, to-wit:

Apl. 14, '08. Def't's Ex. 2 for identification. C. P. D.

* * * * * * *

45 *Testimony of John W. Boland.*

JOHN W. BOLAND testified:

Direct examination:

My name is John W. Boland; I am a conductor for the Chicago Junction Railway Company. I live at 1309 West 55th street. I was working as a conductor for the Chicago Junction Railway Company on the 7th day of December, 1906, the day Mr. King got hurt.

I heard about the accident. That morning my engine shoved down a train of cars from the Ashland avenue yards to the Packingtown west main track. A record was kept of that train movement. It was made in the regular course of business by the man who always took it. In that train was Armour Refrigerator car No. 6189. My engine was on the west end of the train as we came down. The train was shove- ahead of the engine all the way into the yards. During the movement of that train from the Ashland avenue yards to the point where it was left on the Packingtown west main track my attention was not attracted to anything unusual about the couplers of any of the cars. I shoved that train down there. That was my business, and there was no switching on it at all. I left it there. That was all I did on that trip. I did not discover any broken coupler on that train at all. I have no record or recollection of having done so. I cannot tell whether or not I made any examination for the purpose of determining whether or not there was a broken coupling there or not.

Cross-examination:

I was first questioned about this case last Saturday. Mr. Green called me up and told me I was subpœnaed. I never made a statement about it before.

Redirect examination:

It is usual, in the regular course of business down there, when a conductor finds a break, to report it or make some mark on the car. I have no such report in this case.

Recross-examination:

It is usual for us to repair it if we can, and if we cannot we let the car repairers do it.

46 *Testimony of Frank Novotny.*

FRANK NOVOTNY testified:

Direct examination:

My name is Frank Novotny; I am a fireman for the Chicago Junction Railway Company. I live at 4813 Center Avenue, and I was the fireman of the engine which engineer Walsh was operating on the day Mr. King was hurt. Corrigan was conductor. We had made a switching movement with that engine shortly before Mr. King was hurt, by which it had gone up over the east Packingtown main and had come in onto the west Packingtown main, and had moved some cars, in a string of cars there. I did not at any time during that movement see anything of Mr. King. They were not working on my side at all. The engine was headed south. The tracks right at the point where we handled these cars were on a curve that ran from the northwest around to the south. I was on

the left hand side of the engine so that, as the crew worked on the inside of the curve where they could see each other, I could not see them at all. I remember we went in there and took some cars from that string. We went in there, and then we shoved in the cars that the engine still had hold of, and backed onto the west Packingtown main track. Our crew did that said switching in that territory regularly, and Mr. King had been a member of the crew while I was on that engine. I had been on the crew about two months. He was there when I came. The ordinary method of handling these cars from the north end all the way coming south was shoving them down ahead of the engine. When we found the cars standing at that point on the Packingtown west main track, they generally went out through Armours' and through Packingtown. The Armour tracks and the Packingtown tracks were south of this place. They started south three blocks down from where it happened. I did not see Mr. King at any time after the engine shoved the cars in after having set out these other cars. I did not see him get a knuckle off the engine. After shoving in there our engine came to a stop and we backed up and went ahead two or three times. As our engine stood there before the injury to Mr. King, we were closer to Packers avenue than to Exchange avenue. I did not see any of the switchmen at all before the engine started to move. The engine gave two
47 whistles before moving. I got down to put in fire. I was down on the deck when the two whistles were given, starting to put in the coal. The engine did not move before the two whistles were given. I was not up in the cab at all. I was down on the deck, waiting to start shoveling. The engine was standing still when the whistles were blown. I did not see Mr. King after the movement, and the engine started, until they were bringing him up towards the engine. I heard he had been hurt. The engine moved between two and three car lengths.

Cross-examination:

I was down on the deck, getting ready to put in a fire, when the engine started up. I did not open the fire box until he gave the whistle. The whistle and the starting of the train happened about the same time. Sometimes we took cars that were left in on that track, like we took some of these cars and put them on Morris' Beef track, so that our cars standing on this track might be distributed to any side track leading off there, either north or south of Exchange avenue. The top of the cab in which the engineer and I sat is about as high as the top of a box car on some of the tracks, and on some it is lower. When I sit in my own engine on my seat, my head comes within about six inches of the top of the cab, and the top of the cab is about on a level with the roof of the box cars. Some box cars are higher than the roof of the cab.

Redirect examination:

The whistle and the movement came about the same time, but the whistle came first.

48 *Testimony of Thomas E. Corrigan.*

THOMAS E. CORRIGAN testified.

Direct examination:

My name is Thomas E. Corrigan. I am a conductor employed by the Chicago Junction Railway Company; I was working as a conductor on the day Mr. King was hurt. On that day W. R. King and Theodore Shaw were the switchmen and Thomas Walsh and Frank Novotny were the engineer and fireman of my crew. Mr. Walsh was the engineer, and he died several months ago. As I came up on the engine from the south, just before Mr. King was hurt, we backed from the south northward on the east main track, and just as we crossed from Exchange avenue about six car-lengths, the rear end of this train which I dropped off of at the engine, about six car-lengths north of Exchange avenue, I started to look to see what the contents of the train were. A car-length will average about 34 feet. I looked the train over, and in the meantime the engineer and the two other men went to the north end of this train, headed in into it and coupled onto it. They slacked back. They pulled out and back, over a switch and came around and headed in on the side track, what we call the west hay-barn track. This was after they pulled onto it. After they came back, what they had hold of moved. The whole train did not move. About six cars stopped and about six cars on the south end remained standing. I don't remember just where I was when the north cars of the train pulled away from those standing south. I was south of the place where the train happened to be. When I saw those cars going off north, I looked over the remaining train, and walked over to where they were heading in the side-track part of it. That was over at the hay-barn track. The hay-barn track was about 200 feet from the place where they started to move those cars. That is, in a straight line, walking across. To get to it, they had to pull a considerable distance down on one track and shove back on another, over the switch. I just got over to the hay-barn track at the time they got in there. They cut off two cars there, and backed out with the remaining four. When the remaining four cars were backed out, I walked to the part of the train that we had left on the track the same way I had got
49 over before. I don't remember whether I saw a coupler on the north car of these cars that were standing on the west main track up to the time I walked back there. I examined it when I got back. When the engine came back in there, shoving these four cars, we went to couple on, and they would not couple on. They would not hold. The reason they would not hold was because of a broken knuckle. I did not know the knuckle was broken until that time. I do not think I made any examination of it. It was Armour Refrigerator car 6189. Shaw was near me when I found the cars would not couple. Mr. King was on the head end of the train, that was attached to the engine. He was up near the engine. I proceeded to come down towards the south and line up my switches, to

shove the train down. I was going down three blocks, to line up the switches. That was about as far as they wanted to shove the train at the time. That was all the movement we were intending to make of the train. There are in the neighborhood of from 95 to 100 different varieties of safety couplers in use. From what I come in contact with, there was only one of each kind that would fit. A knuckle of any one kind would not fit perfectly any other kind. It would not fit so as to work. It was not the custom of the Chicago Junction Railway Company during the time that I worked there to carry a variety of knuckles on the front space under the boiler head, for the purpose of making repairs in case knuckles should become broken. It was my intention, in shoving the car south to go along with my work and get a knuckle to fit the coupler when we got to it. There is a repair shop or tool house belonging to Armour & Co. known as the old Lipton house, about three blocks south of the point where these cars stood, where the knuckles were kept. I was going to sidetrack the train and go along with other work, I don't remember what it was—until it became necessary to handle that train, and by that time the repairs would be made. I had a talk with a trackman that I met, and the flagman on Exchange avenue, to notify them of my intention of moving the train that way. I don't remember meeting anybody else. I met a man named Tony a little farther down than Exchange avenue. Tony is the Armour car inspector in that district. I said to him: "Tony, we have got a broken knuckle up there on the Armour Refrigerator Line, and we are going to shove the train down, and you get one in the meantime and put it in, will you?" And he said that he would. He asked me the kind and I told him. I don't remember what kind it was, as I did not make any close inspection at the time. I did not pay any attention to which way he went. I went farther south, half way between Exchange avenue and 42nd street, lining up switches. That was the last switch that I had to line up. If the train had run right down the track in the way I had lined the switches up, the train would have run right alongside of this place of Lipton's, where these knuckles were kept, I had no talk with Mr. King after discovering this broken knuckle until after he was hurt. I did not see him after the time I saw him coming around with the remainder of the train after setting out these two cars until after he was hurt. I did not see him after I had this talk with Shaw until after he was hurt. At the time King was injured and prior to that time, it was the custom on that railroad that whenever we should find a knuckle broken, regardless of where the train was standing, and we had a knuckle right there, we would have made the repairs right there if it was absolutely necessary to make repairs before we moved the train, either by going down and carrying one up there or getting one by some other means—it all depends. I did not know that there was a knuckle on the engine, of this type. It was the improved Gould. The improved Gould has a particular kind of knuckle, just like any other coupler. One of these knuckles weighs about fifty pounds. I did not know of any knuckle of that type that was nearer than Lipton's place. The knuckle would not have been re-

quired to shove the train down south in the movement we were going to make. (Hands photograph to witness.) The coupler in this photograph is the type of coupler and knuckle on that car.

Counsel for defendant offers in evidence the photograph referred to, which has been already identified, consisting of a photograph of the coupler and a photograph of the car in question, and the same is received in evidence and marked "Defendant's Exhibit 3."

Said exhibit is in the words and figures following to-wit:

DEFENDANT'S EXHIBIT No. 3.

* * * * * * *

(Endorsed:) Photographer 422 W. 63rd Street. This Photo taken Dec. 8—1906 By G W McWhinney.

51 The break I found in the knuckle was a new break. I came to that conclusion from the appearance of the iron. It had a glittering appearance. (Counsel for the defendant hands to the witness a model of coupler.) This coupler (the model) is a different type, but it operates about the same. I have marked the place where the break came, with a pencil. It is the same general style of coupler, and one of the 95 or 100 varieties I have testified to. The break was of such shape that the front part of the knuckle would still hinge on the pin, and tongue or back part that locked, in the back part of the coupler, remained in the coupler, locked. The front part would not hold because the break would come to prevent it. In case we shoved the train down, as I have described, the front part of the knuckle, which was still fastened to the pin, would have been in the same position as if it was in good order. After I got down into the yard I gave a signal to the train to go ahead. It was just as soon as I got the switch set that I gave the signal to go ahead. I did not know where Mr. King was. The height from the ground of the side of a gondola car such as ordinarily carries coal varies considerably. None of them are lower than a man's head. The lowest one would be about two feet above the head of a man five feet ten inches; two feet anyway, and some of them run higher. The signal I gave when I was down in the yard for the train to come ahead south was given to the rear man, Shaw. He was on top of the train when the signal was given. After I gave that signal he repeated it to the head end of the train, and then the train moved forward. Before the train moved forward or at the time the train moved forward, I heard the blasts of the whistle from the engine. I was some distance south at that time. I do not know exactly when it was with reference to the time I saw the train moving. When they are operating the train on those tracks; as it was standing still and I wanted to start it over the street crossing, there was no custom that I know of about giving any signal before starting the train. We have given signals before starting over the streets. When we were standing close to the street crossing, and the train was about to start, we ordinarily gave a signal to move the direction we wanted it to go. That is all.

52 Cross-examination:

I could not say whether that whistle came the instant before or the instant after or the very instant the train started. It depends on the circumstances, as to whether or not it was customary to ring the bell before the train started. If there was nobody to warn,—a flagman, by person or by voice—they rang the bell, otherwise they would not. A switch engine does not blow the whistle every time it moves forward or back. The ordinary and usual occasions upon which they blow the whistle before starting or at the time they start a train switching is a signal in answer to a signal, as well as a warning. They do it at times. In switching backward and forward, when the brakeman signals to the engineer to come back, he does not blow the whistle in all cases. I do not know the custom about the whistle on an engine. When an engine is switching cars in the Yard and moving backward and forward, crossing switches and getting onto tracks, distributing cars, breaking up a string of cars or making up a string of cars, when an engine is doing that kind of a job, ordinarily it does not give the signal before each movement. The special occasions upon which it does give the signal by a whistle is to answer a signal and to give a warning. That unusual signal is given probably to have the man repeat his signal, that he did not understand the first time. If the engineer got part of the signal and did not understand it thoroughly, he would blow the whistle, and wait until the signal is given to him and he would understand it. When it is thought there is something out of the usual, and that some special warning is required, the whistle is given in some cases. From my observation, in the conduct of this kind of business, the conditions under which such a signal is given by a switch engine are as a warning for a train to move or about to move, or it is to have a man repeat his signals that he did not properly understand.

Q. Aside from the case of repeating the signal, are the occasions when he resorts to the blowing of the whistle before starting his train—are not they usually occasions when the engineer for some reason thinks that a man may be between the cars, under the cars, or some special danger exists?

To which question counsel for the defendant objected on the ground that it excludes the other circumstances under which the witness has stated that the signals are given; which objection
53 was over-ruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Well, he might be thinking that all the time, and his whistle would be blowing all the time. I don't know the nature of his thoughts.

It all depends on the circumstances, whether they blow the whistle in one movement or in two or three in switching. He blows it on special occasions, that is, to answer signals and to have the man repeat the signals. The track on which the accident occurred was set aside as a delivery track, to deliver cars for our crew to take away. Other uses were made of that track if necessary. If the

other tracks were to be used for other purposes, our engine was the only one that used that track and trains making deliveries there. The custom about whether to repair a coupler where it was or taking the car to some place else, was according to what we thought was the most convenient thing to do. We shoved these cars down three blocks because we thought it would be more convenient to make repairs down there than to carry the coupler up to where the car stood. It was because it would be more convenient; then we could go right along with the work and avoid labor. If I had wanted to I could have sent for the knuckle and had it repaired where the car stood, and if I wanted to I could have gone down myself. I could not have uncoupled the engine and run down the adjoining track and got the coupler because we could not have gotten over the switch in order to get around to get down. My engine had just come up that track east of this train and backed up in on the north end. It could have retraced its steps if I could have gotten out over the switch to get around. The switch leading from the track I was on, over to the other one. My engine had just crossed over that switch twice, once in backing in onto this track and once when it returned, after delivering the cars on the hay track. I did not know of any other train around there, but I could not tell until I could get out there. Providing I could get over the switch, my engine could have uncoupled from the forward end of that train and run across that cross-over to the east track and run south and have gotten the knuckle. I do not know of any reason why I could not have gotten over the switch. I would have had to investigate. I do not remember seeing Tony the car inspector after the accident. There was a knuckle in that car right after King was hurt, at the place where he was hurt. I do not know whether Tony came up there with the knuckle imme-
54 diately after the accident. I was not there at the time. I was not there when it was put in. Tony said nothing to me about its being heavy to carry, and I did not hear him say anything to anybody else. I was assistant yardmaster there as well as foreman of the engine. I had charge of those tracks and the engines that ran through that district. If I discovered anything wrong with a car, I did not have to go to somebody else to find out whether I would set that car out or use it. I decided that for myself. It was customary for any of the switchmen, whenever they found a defect in the couplers which they could repair, under certain circumstances, to repair it. That was ordinarily the way the work was done; if a man found anything was wrong that he could fix, depending on circumstances. It all depended on the circumstances, whether the man would go ahead and fix it, if he could, when he found it out of order. I know what "ordinarily" means. Mr. King had worked in my crew three or four months.

Q. Do you recall, Mr. Corrigan, during the time Mr. King was switching there, of any other occasion when you shoved a train down into the Yards from there that had a broken knuckle,—now yes or no; do you recall any occasion?

Which question was objected to by counsel for the defendant on the ground that it is immaterial and incompetent; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Not of that nature.

I had twelve cars in the entire cut when we first coupled on to the train, and 10 after the two were cut out. Mr. King was the head man. He was to follow the engine and couple the engine on and wait for instructions and signals, etc. He was the head man, as between the two switchmen. The rear man in matters of this kind usually gets the signal and it is transferred to the head man and from him to the engineer. In backing a train of considerable length, the rear man stands on the rear car or thereabouts, and he will signal and the head man transmits that signal, to the engineer, and the engineer backs up. An engineer sitting in his cab window can easily look over the top of a gondola car. I last saw Mr. King on top of the car next to the engine, the first or second car. That was when Mr. Shaw and I were talking about this broken
55 knuckle. Show was on top. Shaw walked south, on the top, some ways, and I walked on south alongside the car. I said nothing to King.

Q. And you were down—now, speaking about moving this train, you could push it down with a knuckle broken, you could push it down if it had not any coupler at all, couldn't you?

A. Yes.

To which question and answer counsel for defendant objected on the ground that the matters therein referred to are immaterial; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

We were going to pass over Exchange avenue, which is a busy thoroughfare.

Q. You were going to cross over two other streets and a railroad crossing before you got down to where you intended to leave this train.

Which question was objected to by counsel for defendant on the ground that it is incompetent and immaterial which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Yes, sir.

Q. If your engine was not coupled onto these cars, of course, you could not stop the cars if occasion arose, with the engine, could you?

Which question was objected to by counsel for defendant on the ground that it is immaterial; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. No, sir, only with hand brakes.

Q. Of course the engine could not control the cars as long as it was not coupled to them?
A. No, sir.

To the three preceding questions and answers counsel for the defendant objected on the ground that the defendant was not charged with any negligence in that regard in the declaration, and moved that the answers to said questions be stricken out because the statute does not provide about movements of cars as to public or street crossings, and the only point in the counts of the declaration is on whether or not the employé knew or should — known the
56 conditions; which objection and motion were overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

There were a few tracks curved off this track on which this train stood, between where the train stood and the place I was going. There was one at the point the train stood, off on 36, and several others all the way down. I do not know that I have run across as many as 95 different kinds of couplers.
Q. Just name them, Mr. Corrigan, all that you can name, as quick as you can.

To which question counsel for defendant objected on the ground that it was not a fair test; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. I really don't know what to start with, and how to keep track of them. There was the Janney; then they improved on that, I believe. There is the improved Gould, 1900, the Trojan, the Buckeye, the Tower, the Major, the Standard and several that I cannot recall. I cannot think of any more now. I could tell what they were when I saw them. The coupler at the break was steel. It was a steel knuckle, moulded. It was a new break, as far as I could see.

Redirect examination:

The several side tracks about which I have testified, between the point where the train stood and the point we were going to, were the side tracks we were lining up the switches, to see that the main track was straight all the way down. An engineer could not see over the top of those gondola cars a man alongside the third or fourth car from the engine. The curve would bring the cars in this way. I never knew Mr. King to shove a train down there with a break of the same nature to the couplers, but I have known them to shove trains where they were not coupled. I don't remember for what reason they wasn't coupled. The curve or the switch at the end of the curve to the north-west was the end of the Packingtown main track. That connected the tracks of the Back Way district and what we called the west end. I could not state exactly how many engines were there working ordinarily in the Back Way and West End districts about that time in the morning. If it was a heavy

morning the stock run. On a heavy stock morning the stock
57 trains all came through that district. There are five different tracks there, and there could be five trains at the same time going in opposite directions. There might have been five trains. They were liable to be working up and down those tracks at any time. We did not make all south bound movements on this delivering track in the Packingtown district. We do not move directly south when we get hold of a train there, in all cases. That was the track we ordinarily used unless for some unusual reason it was blocked. We could not use the east main track until everything on the track got out of the way, going north. North bound trains had the right of way on the east main track. One engine at a time worked in the district of which I was yardmaster on the morning of this accident. That was the one I was working on. There was no other in that district then. The blowing of a whistle in order to have a switchman repeat the signal I had not noticed to be a custom in the operation of the switching of a train. It did not very often happen that when a signal was given to the engineer he got it wrong and wanted to have it repeated to him to be sure about it, but when it did happen he blew the whistle to get it again.

Recross examination:

The place where the stock trains were moved was not on our system of tracks, but in our engine coming up to get from the east track onto the west, it would have to go on one of the tracks that was used for those other trains out at the west end. Sometimes a switch tender was stationed there when stock was coming in. It is where the two branches sort of meet. And at that place we would have to run a short distance on that track in order to cross over. That was always kept open for use going either way. The delay while the entire train passed before we could use the switch depends upon how soon the train would get in the chutes, whether it would be an instant or an hour. I have known them to stand there for an hour at a time, to get into the chutes.

58 *Testimony of E. J. Constant.*

E. J. CONSTANT testified:

Direct examination:

My name is E. J. Constant; I am a car foreman for the Chicago Junction Railway Company, I was working for that company as a car man in December, 1906. I have been a practical car man about eighteen years. In that time I have had occasion to supervise repairs and to make repairs myself. I am familiar with the different classes of coupling devices that have been used since the Safety Appliance Act required cars to be equipped in that manner. There are 97 different varieties of safety couplers. I have a book or catalogue showing those different varieties. (Produces document.) I am familiar with the coupler known as the improved Gould. I made

American Steel Foundries Knuckles, Locks and Pins

Gallagher—34 lbs.
No. 30.

Could (Passenger) 36 lbs.
No. 33.

Hein No. 3—41 lbs.
No. 36.

Fox—35 lbs.
No. 29.

Could (Improved)—51 lbs.
No. 32.

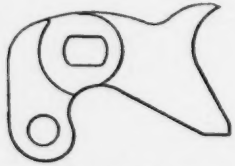
Hein No. 2 C—45 lbs
No 35.

Foster—43 lbs.
No. 28.

Gould (Freight)—36 lbs.
No. 31.

Hein No. 1—40 lbs.
No. 34.

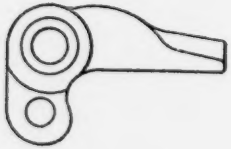
Hinson—49 lbs.
No. 37.



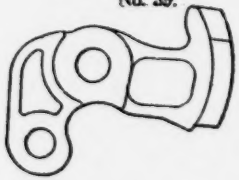
Hinson (Trunnion)—54 lbs.
No. 38.

Janney 2 F.—38 lbs.
No. 39.

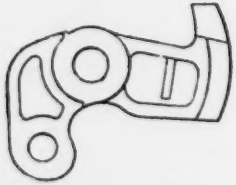
Janney 448—52 lbs.
No. 40.



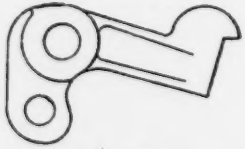
Johnson—39 lbs.
No. 41.



Kelso (6-in. Hub)—64 lbs.
No. 42.



Kelso (8-in. Hub)—66 lbs.
No. 43.



Leeds—40 lbs.
No. 44.

Little Delaware No. 1—52 lbs.
No. 45.

an examination of the car upon which Mr. King was injured in the neighborhood of ten o'clock on the morning of December 7th, 1906, shortly after the accident. An improved Gould coupler was on that car. I did not find anything the matter with the couplers at either end, and nothing was called to my attention at the time I made the examination. I was called there by the claim agent to examine the car on which Mr. King got hurt. When I got there it was all right. My attention was called to parts of couplers near there. I found a broken improved Gould knuckle. That was about two blocks north of where I examined the car. The car was south of Exchange avenue when I examined it, and the knuckle was north of Exchange avenue probably two blocks. I found the tail of the knuckle broken off from the face. By the tail I mean the part that goes behind the locks. (Shows model to witness.) The part marked with pencil is what we call the tail of the knuckle, and that part I found broken off. It was a good clean break, and had the appearance of being fresh. It was just a pure steel knuckle, cast steel. Cast in a mould. Those knuckles are subjected to a test before they are put out of the factories, and that is required by the master car builders' rules. They are manufactured by the Steel Foundaires, but they are accepted by the master car builders' association. Before knuckles are put into service they are tested by a drop of four feet, 1640 pounds test. That test is made by a trip hammer and three
59 blows are required to be struck, at a height of four feet. The weight of the knuckle in the improved Gould coupler is 51 pounds. It is shaped something like what the model shows. Of these 97 different varieties, the knuckle is not interchangeable with other makes, and for that reason you cannot use a knuckle of an improved Gould in a Janney coupler. There is a difference in the tail of the knuckle and the lock. It might fit into the coupler, but it would not lock. (Witness produces catalogue). The particular knuckle of the improved Gould coupler is on page 23 of the catalogue. I have made a mark on that with a pencil about where I found the break.

It is stipulated and agreed by and between the attorneys for the respective parties, that the catalogue referred to shows 97 varieties of couplers, and that the same are all regularly catalogued; that page 23, containing illustration No. 32, marked with pencil, may be cut from the catalogue and attached hereto and marked Defendant's Exhibit 4. Said page is hereto attached, and is in the words and figures following, to-wit:

(Here follow diagrams marked pages 60 and 61.)

62 Cross-examination:

There is, however, a skelton knuckle that can be used temporarily in place of any broken knuckle.

To which statement counsel for the defendant objected for the reason that the plaintiff stated that there was such a knuckle but that it was not customary to carry it on engines, and he knew there was not one on this engine. Which objection was overruled by the court, to which ruling of the court the defendant by its counsel then and there excepted.

They can put the skeleton in any of the couplers; that is it will take the place of all of the varieties that I have found. I am not able to tell just how long the clean break had been broken. I do not think the knuckle had been broken a day. It will change color sometimes. I never made any tests in that regard.

Redirect examination:

After one of these skeleton knuckles is put into a coupler the coupler cannot be opened by using the coupling lever, because the tail of the knuckle runs back into the shank of the coupler. The tail on the emergency knuckle is probably 12 or 14 inches long, and instead of having a tail, sharp like these that fit into the lock, that 12 or 14 inch piece runs straight back in, and the tail bears against the side of the shank of the coupler and impedes that from turning. When you put in an emergency coupler you have got a rigid knuckle there which cannot be opened until you take the pin out altogether and the knuckle. You must take the knuckle out before you can make a new coupling of that particular coupling.

Recross-examination:

Q. You can raise the lever on the other car, can't you?

Which question was objected to by counsel for defendant as immaterial; which objection was overruled by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

A. Yes.
Q. And pull the other car away?
A. Yes, sir.

63 *Testimony of Theodore Shaw.*

THEODORE SHAW testified.

Direct examination:

My name is Theodore Shaw; I am a railroad switchman and am working for the Chicago Junction Company. I have been switching for that company about eight years. I was working in conductor Corrigan's crew on the day that Mr. King was hurt. On the

day Mr. King was hurt we backed up the east main track. I was looking along the cars to see where the different cars went what point, what side track. We got to the north end of the switch or the track rather, and we headed in on twelve cars standing on the west main track. We coupled onto them and gave the engineer a signal to back away,—slack back—to see if they were all coupled. I saw that the cars separated, six cars from the engine. I then thought that Mr. Corrigan had made the cut there, as the two cars, the fifth and sixth, were for Nelson Morris & Company. There were two or three delivery tracks near there, for Morris. We backed over the switch, and came ahead on the east main track. Mr. Corrigan threw the switch and headed the two cars in on what they called the west hay-barn track. I mean he threw the west hay-barn switch, leading to the west hay barn track. That is not the switch that connected the east and west main track. It is another one, about seven cars east of the switch, where we crossed over. After that switch was turned Mr. Corrigan cut off the two cars. We spoke to each other in regard to the switch. I told him I thought he had made the cut. After we cut off those two cars at Nelson Morris's we backed up again and came back on the west main track with the four head cars, Armour freezers, I was riding the hind car on that train of these four cars, the fourth car from the engine, looking ahead to see the direction in which the train was going, Mr. King was on the foot-board of the engine, back four cars from me. I threw the switch leading onto the west main track and got up on top of the fourth car as we came ahead. When I got down to where the hind end of the train was, Corrigan was standing there. He had walked from the hay-barn track. We struck the cars and before we struck them I saw that the knuckle was broken. I was on top of the fourth car. The end of the fourth car was within half a car length from the car that was standing on the track.
64 They came in contact before the head end stopped. After they came together they failed to couple. At this time I was on top of the fourth car while Mr. King was on the top of the car next to the engine. The train was then standing still. When we saw that it was going to strike the cars and couple, I gave the signal to stop. Up to that time I had no knowledge that the knuckle was broken. That was the first I knew of it. The cars went about five feet. Mr. Corrigan walked down the east side of the train towards Exchange avenue. I jumped from the hind end of the fourth car onto the fifth car, walked to a car of coal, slack coal, which was the seventh car from the engine. I jumped down on top of the coal and from there got down on the ground. I looked to see where that car went to, the car of coal and the car next to it, that was for Swift's Warehouse 14. The next car was a car for Thorgusson. The next two cars were for Nels Morris. I got up on top of the hind car of the ten cars that were standing, and when I got the signal from Mr. Corrigan to back up I could see the engineer from the hind car, so I walked three cars ahead, which placed me on top of the Thorgusson car. At that time I could not see Mr. King. I had not seen him from the time I saw him on top of the car next the engine,

and I did not know where he was. I had not talked with him at all. I could see the engineer from the top of the third car from the hind end, and I gave him the signal to back up or go ahead. I gave it two or three or four times. He took the signal and came ahead. At the time he came ahead he whistled twice, showing that he probably had taken my signal. From where I stood on the third car from the hind end I could see right across the curve the same as a bow. I could see the engineer right across, the same as a string would be on a bow that was bent. The cars made the bow, and looking across made the string. There was nothing inside of that curve on the ground to hide my view from the top of the car. There were cars on the other tracks. I could see across the tops of them. The engineer took my signal and came ahead. I heard a cry and I gave him the signal to stop just as quick as I could. He probably moved ten or twenty feet, and I saw Mr. King walk out from the cars on the east side of them, about two car-lengths from me, just north. I got down and went to him as fast as I could. His hand was all smashed. And I asked him how he got caught.

He said he was putting in the knuckle. That is all I remem-
65 ber except his speaking of the pain in his hand. As we came up the east bound track, before *me* moved this train I was looking over the cars to see where they were going. There were no gaps in the cars that I could see, no space. After Mr. King was injured I made an examination of the place where he was injured, of the knuckle on either side. He had taken the knuckle out, which was broken and lying on the ground, where the train had been standing. The other knuckle was probably placed in the car. I looked at the broken knuckle on the ground. It was broken right at the joint of the tongue, which is the part that goes back and fits in the lock. The break was a fresh one. I knew the train was going to be shoved down the track towards Lipton's old plant. There was a supply of knuckles down at Lipton's. It was not necessary to couple those cars together to shove the train down there. Before the new knuckle was out in the train would close up and shove as well with the part of the coupling that was fast in the pin as though*t* it were a complete knuckle, but you could not stop it. It presented the same flat face that it would if the break had not been made in the knuckle, and you could shove it down in that way. In starting a train, to get over those street crossings down to Packingtown main track, no whistle signals were given unless we saw a wagon or danger. That would be, when the engineer would see it. The engineer could not see any of these street crossings at this time. During the time that I worked with the Junction Company and during the time that Mr. King worked in my crew, it was not the custom to carry on the front end of the engine a supply of knuckles for the purpose of making repairs, and I never heard of it. It was not the custom when a break as was found in this knuckle was discovered, to hold the train right where it was until a repair was made. There was no change in the custom for three months before the accident from what it had been five or six years before, that I ever knew of or heard of. When we discovered a break of this na-

ture or a similar break, it was customary to shove down and get a knuckle or else take a knuckle from some other car and use it and replace the knuckle we took afterwards.

Q. There was no custom then, to invariably make the repairs at the point where a break was discovered. Is that right?

Which question was objected to by counsel for plaintiff. Counsel for defendant stated that he proposed by the question to
66 meet the flat testimony of the plaintiff in the case, who had testified to the custom to invariably make repairs at the point where the break was discovered as an actual fact in the case. The court sustained the objection; to which ruling of the court the defendant by its counsel then and there duly excepted.

I knew there was a knuckle on the front end of the engine when we went to work in the morning. It was what they call a Chicago knuckle, used by the Northwestern Railroad. That was the only knuckle that was on the engine that I saw that morning. At the time of the accident Mr. King told me that he had picked up this particular knuckle and put it on the engine. He did not say just how long it was before the accident. On the west bound main track the cars all went south. All the cars that were in that string, except the two Nels. Morris cars went to the south. Those two were on the south or hind end. We were going to make the movement south before handling the two southern cars. We would have to do that because a broken knuckle would not pull the train north.

Cross-examination:

Sometimes, in a case of this kind we would shove the cars down and leave them on the west main track or the east main track until we got rid of the Armour and the 14 House coal. There was no regular way about it. The different work would made a different movement, probably a different movement every day. Nelson Morris's place was up near the north end, where our engine was. The major part of the work of our crew was for Morris, Swift, Armour and their cars. They all had pretty near the same kind of knuckles. Armour & Company had nearly all their cars equipped with the same kind of coupling. Morris & Company did not, and we handled more foreign cars for Nelson Morris than we did for Armour. Morris had all kinds of knuckles. So did Swift. Sometimes we would have knuckles on the front end of the engine. It might be a week again when we would not have any. There were generally from five to ten knuckles under the platform at Armour's office track. I supposed those were Armour's. There was another place at Lipton's. Lipton's place was eight cars south of the plat-
67 form at Armour's place. Armour's office track is north of the ice track. I think it is 43rd street that crosses there. If any of the men found a coupler out of repair and we could make the repairs, we made them. Mr. King had been in our crew about four months before the day of this accident. I could not say just how long it was.

Q. Do you remember of any particular occasion during the time

Mr. King was in your crew when you shoved a train with a knuckle that was broken so it would not couple, shoved it from up north of Exchange avenue down south, do you remember of any particular instance when Mr. King was with you?

Which question was objected to by counsel for the defendant as incompetent and immaterial. Which objection was overruled by the court; to which ruling of the court the defendant, by its counsel then and there duly excepted.

A. I cannot remember any particular instance. There is always more or less cars with knuckles broke in Packingtown.

Counsel for plaintiff moves to strike out the latter part of the foregoing answer; which motion was sustained by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

Our engine was a light engine, when we coupled onto the north end. We made an ordinary coupling, and went no faster than was necessary. Just went up and coupled the cars, I do not recollect when I coupled the cars. I walked along down by the side of the train until I came to the opening, and then saw that the two south cars were for Morris. After I went down with the four cars after putting the two cars on Morris's track, I saw Mr. Corrigan at the north end of the train and had a talk with him about putting these cars away, the substance of which was that I said I thought he had made the cut, and he said No, he had not, but that it was all right as long as those cars went there, and that he saw the coupler and said that was what made the cut. I spoke of it being a fresh cut. I am not an expert on iron. I could not tell whether the break was eight hours old or two hours old or one hour old.

68 Redirect examination:

The talk with Mr. Corrigan to which I have just alluded, was after we had set the cars on the Morris hay-barn track. I could not say positively whether it was when we were coming in with the four cars back on the west main track, or when he cut off the two cars. We mentioned something before the cut. I do not remember just what it was, and whether it was at the time we cut off the two cars or whether it was down at the north end of the cars. I understood Mr. McShane to be questioning me about the time when I came back in with the four cars after we had pulled them out. I did not know where there was a broken knuckle when we were up at the hay barn track, or at any time until we got back down to the west main. The conversation with Corrigan was that I thought he had made a cut, and he informed me that he had not. When I saw the two Nels. Morris cars cut off the Armours—if it had been between the Armour cars,—I would have known nobody made the cut because I knew their movement was south; but when I saw the cut behind the two Morris cars I saw or thought that the intention was to pull them back and put them on the Nelson Morris track, and I think anybody else would. After telling him that he had not

made the cut, and we backed up with the cars and struck the cars, we noticed then, before the cars struck that the knuckle was broken; but before the engine stopped the four cars, the cars had struck and the engine stopped as soon as the cars struck; the cars ran then about four or five feet from the head end. Mr. Corrigan says to me: "I will go to the hind end, I will go down to the crossing and set the switches, and when I set the switches, I will give you the signal." That is the way I understood it. I could not say whether those were the exact words. When he left me I jumped from the fourth car to the fifth. That is all the talk I remember with Mr. Corrigan. We said nothing about the repairing of this knuckle. Corrigan said he would shove the hind end down from the Armour crossing, and he went down there to set the switches.

The COURT:

Q. Before he went down to set the switches, did he say anything more than he would shove down?

A. No, sir.

Mr. BLACK:

Q. And what did you understand from that?

69 Which question was objected to by counsel for plaintiff; which objection was sustained by the court; to which ruling of the court the defendant by its counsel then and there duly excepted.

If we are moving either way on these tracks with cars, and we should find a break and it was a handy thing for us to do, we might take a knuckle from a car on a siding and put in the place of it, and afterwards put one in the place of the one we stole. If it was some part like a broken draw-bar,—a broken part of a draw-bar, or something of that sort, aside from the knuckle, we never repaired it. We would either side-track the car, put on a chain or a piece of chain, or ask for the car repairers to fix it. We would set it off the main track, where it could be repaired. We would genarally side-track it. The movement on that track was usually a south movement. When I spoke about a chain and a broken draw-bar, I meant a chain was being used instead of a draw bar.

Testimony of Tony Tozinski.

TONY TOZINSKI testified.

Direct examination:

My name is Tony Tozinski; I work for Armour & Company; have been working there seven years this fall, repairing and inspecting refrigerator cars, I was working up there the day Mr. King was hurt. I was in the shanty at the time. The shanty was at the Armour-Lipton house near the Packingtown tracks, about three blocks south of Exchange avenue.

I left the shanty and started up the tracks to go after a knuckle.

When I went up towards the train the first time I went to inspect a car. I knew there were some Armour cars there at that time. As I was going up towards the train I met Mr. Corrigan, the conductor on 42nd street. He told me, "I got a knuckle on the west main track." I asked, "What kind?" and he said he didn't know, to go look myself. I went and looked at the knuckle. I found it was a new Gould style. That is, the improved Gould coupler. The knuckle was broke through the tongue. It was a new break. I just looked it over, and sent back to my shanty, to get another knuckle. I got another knuckle at the shanty. The shanty was about three blocks south. I fetched the knuckle back to
70 the same car. When I got back the car had not been moved. It was about in the same place. There was no change there. The broken knuckle lay on the ground, and the good knuckle was on the ground: there were two knuckles at that time lying on the ground, and a pin, a broken one and a good one. I saw the blood on the coupler and on the ground. I put my knuckle into the car. I did not see Mr. King at all. I went back to my place to work again.

Testimony of Patrick Shaw.

PATRICK SHAW testified.

Direct examination:

My name is Patrick Shaw. I am a trackman for the Chicago Junction Railway Company. I was working for that Company in December, 1906, when Mr. King was hurt. On the morning he was hurt I was working at Exchange Avenue. The cars on which he was hurt were on the north side of Exchange avenue, about what we call a car-length from the crossing. It was north of the crossing on that they call the west main. I was just on the south side of the street crossing of Exchange avenue, cleaning out a switch there. Just before the accident happened, the conductor came along where I was cleaning out the switch, and he says: "You better get out of the way there, Pat, because we are going to shove them cars down." That was the first time I saw him. He went past me, threw the switch, and then went by the next switch south of me. I did not see anything of the accident itself. When Mr. Corrigan told me to look out, that the train was coming, I looked to see if it was coming, and I saw switchman Shaw get on top of the car. I was away back in the middle of the train from me. I could not say exactly what car. He commenced to walk towards me on the top of the cars. I heard the signal of the train, two short blasts of the whistle, and I commenced to pick up my tools and throw them out of the way, and when I looked back again I saw Shaw flagging down the train in an excited manner, and he made a motion which I thought was to me or Corrigan, and I ran up towards him. I thought probably they were off the track. When I got up there I met King coming out from between the cars, and he had one

hand in the other, like this (indicating). After they took
71 King away I went back to see where the opening was between the cars, and I saw what they call a knuckle there lying on the track, and a pin. The knuckle that was lying on the track at the opening was a good knuckle. I looked farther back on the cars that were north of the opening, where the cut was, and saw a part of a broken knuckle under the car. That was about half a car length from the opening. The broken knuckle looked to me like a new break. It was broken clear through, into two parts.

Cross-examination:

I was the trackman. There was a crossing flagman there too. I could not really say how many hours the knuckle had been broken. I mean, it was not an old break.

And thereupon the defendant rested its case.

And the plaintiff introduced no evidence in rebuttal.

Which was all the testimony and evidence offered or introduced by the said parties or either of them on the trial of the above entitled cause.

And thereupon the defendant, at the conclusion of all the evidence in the above entitled cause and before any instructions were asked by either party or were given by the court to the jury and before the argument of counsel, moved the court to instruct the jury to find the defendant, the Chicago Junction Railway Company, not guilty, and the said defendant presented to the court its said instruction in writing, which said instruction is in the words and figures following.

"The court instructs the jury to find the defendant, the Chicago Junction Railway Company, not guilty."

the giving of which said instruction was refused by the court, and the motion for the giving of said instruction was overruled; to which refusal and ruling of the court, the defendant by its counsel, then and there duly excepted.

And thereupon the counsel for the plaintiff and the defendant made their respective arguments to the jury in said cause.

Court's Instructions to Jury.

And thereupon, at the conclusion of the arguments of counsel to the jury, the court instructed the jury as follows:

Gentlemen of the jury, it is the duty of the court to give
72 to the jury a statement of the law of the case. It is the duty of the jury to decide questions of fact in the case on the evidence of the witnesses who have testified, under the instructions which the Court gives to the jury.

This is a civil suit, and in civil actions the rule which the jury will be guided by in determining what has been proved or what has not been proved is what is known as the preponderance of the evi-

dence. In this respect a civil case differs from a criminal case. In a criminal case before the defendant may be found guilty the jury must be convinced of his guilt beyond what the law calls reasonable doubt. Not so in a civil case. By the expression "preponderance of evidence" is meant the greater weight of the evidence that evidence which you have heard, of all the evidence which carries conviction to your mind as being the truthful testimony which you have heard. It is not determined solely by the number of witnesses, the greater weight of the evidence may be with the fewer witnesses. In determining where is this greater weight of the evidence you will subject the testimony of all the witnesses to these tests which your experience and observation as men in the affairs of the world have convinced you and shown you are fair tests for determining where the truth is in the events of a conflict respecting a matter of fact. You will take into consideration the attitude of the various witnesses; their means or opportunity of information respecting the matters regarding which they have testified; their interest, if any appears in the case, in the outcome of this case or in the subject matter of the case; all these things with a view to determining much weight you will give to the testimony of the several witnesses.

Now, before the plaintiff can recover in this case it must be established by a preponderance of the evidence that his injury for the sustaining of which he brings this action, was caused by the defendant's failure to obey the Act of Congress on the question of providing cars with couplers which may be operated without the employee going between the rails. If it appears in this case that this injury resulted solely from the negligent act of a fellow servant, dissociated entirely from the defendant's failure, if failure there was, to obey this law of Congress, the plaintiff cannot recover.

If his injury was the result of the defendant's failure to obey
73 this law of Congress and also the negligence of a fellow-servant of the plaintiff, the plaintiff is entitled to recover in this case; and on the evidence in this case the court charges you that Corrigan, who has testified here as a witness was not a fellow servant of this plaintiff in respect of the question of determining whether or not the car with the defective coupler should be repaired or not before it was moved. The Act of Congress, which was in force at the time of the plaintiff's injury, made it unlawful for any common carrier engaged in interstate commerce, by railroad to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be coupled and uncoupled without the necessity of men going between the ends of the cars for that purpose. And this Act also provides that any employé of any such common carrier who may be injured by a car or cars in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use of the car or cars had been brought to his knowledge.

Ordinarily the conductor, engineer, fireman and switchman of a train are fellow-servants and ordinarily neither can recover damages from the employer on account of an injury occasioned by either

of the others; but in this case if you believe from the evidence that the authority which the defendant conferred upon Corrigan as conductor of the train in question, as assistant yardmaster authorized and empowered him to decide whether to repair the coupler or have it repaired where the car stood, when he discovered it was broken, or to remove the car to another place for repair—and I charge you that the evidence in this case shows that Corrigan did have such authority—then Corrigan, in deciding which one of the two courses he would follow, was in that respect not a fellow-servant of the plaintiff, but was a direct representative of the defendant company in that regard, and his action and conduct in that respect was in law the action and conduct of the defendant company.

Now, when Corrigan discovered that the coupler was in such defective condition that it was necessary for a switchman to go between the ends of the cars to replace the knuckle in order that the cars might be coupled—that it was necessary for a switchman or other person to go between the ends of the cars to replace
74 the knuckle in order that the cars might be coupled, it was his duty not to haul or use the car while the coupler was in that condition unless there was a necessity for so doing, and if it was reasonably practicable in the prosecution of the defendant's business for him to have repaired the coupler or had it repaired where the car stood, it was his duty to do so; and the mere fact that it was more convenient for him to repair the knuckle at the place where the evidence shows he intended to repair it did not justify him in unnecessarily moving the car in its then condition to that place.

The plaintiff cannot recover in this case if the evidence shows that he was not at the time of the happening of the accident to him and in his movements immediately preceding same and connected with it, in the exercise of ordinary care for his own safety.

By ordinary care is meant the degree of care which a reasonably prudent man, under like circumstances and conditions would exercise for his safety.

If you believe from the evidence that the plaintiff was reckless or careless of his own safety in going between the cars at the time when he entered, just before the accident, and that his course was such as would not have been adopted by a reasonably careful man, then the plaintiff cannot recover.

If you believe from the evidence in this case that the plaintiff knew that a movement of the train was likely to be made south and that he knew that two whistles of the engine meant that the train was to be put in motion, and that the engineer gave two whistles of the engine before starting the engine in motion in time to have enabled the plaintiff, by the exercise of ordinary care on his part for his own safety, to have stepped from between the cars before the cars came together, then the plaintiff cannot recover in this case.

The burden of proof does not rest upon the plaintiff to show that he was in the exercise of ordinary care; but the burden in this regard is upon the defendant to prove that the plaintiff was not

in the exercise of ordinary care; and hence, in deciding whether he was or was not in the exercise of ordinary care, it is the law that he shall be given the benefit of all reasonable inferences in respect to matters not proven or matters left in doubt.

In determining whether or not the plaintiff exercised or-
75 dinary care, you will consider his testimony as to what he did in connection with the testimony of all other witnesses in the case, on both sides, relating to that subject.

While the burden is upon the defendant to prove that at the time of the injury the plaintiff was not in the exercise of ordinary care for his own safety, yet in determin-g whether or not he did exercise such care, you will take into consideration all the evidence introduced in the case by both parties bearing upon that subject.

In passing upon the question as to whether the plaintiff should or should not have anticipated that the cars would or might be brought together while he was adjusting the coupler, he had the right to assume, in the absence of express or implied notice to the contrary, that the engineer and conductor would act with due care in the performance of their respective duties, and he was not guilty of negligence in not anticipating that either the conductor or the engineer would be guilty of negligence, but upon the contrary, in the absence of such notice he had the right to act upon the presumption that they and each of them would exercise ordinary care in the performance of their respective duties.

If, under the evidence and the instructions of the court, you find the defendant guilty, then, in assessing the plaintiff's damages it will be proper for you to consider the effect of the injury in the past and in the future, as shown by the evidence, upon plaintiff, the use of his hand, and his ability to attend to his affairs generally in pursuing any ordinary trade or calling, if the evidence shows that these have been affected in the past and will be affected in the future; and also the bodily pain and suffering if any, he sustained and which the evidence shows to be the necessary and direct result of the injury complained of.

In determining the question of whether or not the defendant is liable under these instructions, you will be moved and influenced to no extent whatever by sympathy for the plaintiff in his present condition or by the fact that the plaintiff's action here is against a railway corporation. These questions you will determine just the same as if the plaintiff were suing an individual.

And thereupon, in the presence of the jury, but not within its hearing, and in the presence and hearing of the court and counsel for the plaintiff, the following proceedings were had and taken:

76 Counsel for the defendant requested the court, on behalf of the defendant, to instruct the jury, in connection with the question of liability, that the amount of the damages suffered by the plaintiff is not to be considered unless and until the jury determines that the defendant is liable to the plaintiff; that the question of liability must first be determined. Which request so to instruct the jury was refused by the court; to which refusal of the court so

to instruct the jury the defendant, by its counsel then and there duly excepted.

Counsel for the defendant referred to the instruction given by the court that the plaintiff had the right to presume the engineer would not act negligently, and requested the court, on behalf of the defendant, to qualify the said instruction by further instructing the jury that it does not necessarily make any difference if the injury in fact resulted solely from the engineer's negligent act; that the presumption would not make any difference if the engineer and the plaintiff were fellow-servants. Which request so to instruct the jury was refused by the court; to which refusal so to instruct the jury the defendant by its counsel then and there duly excepted.

Counsel for the defendant referred to the instruction given by the court, that the defendant could not move the car unless it was necessary to do so, and requested the court to modify the same, to the effect that if it was a proper railroading proposition that the car could be repaired sufficiently by the movement to where supplies were kept, that if that was a reasonable thing to do, the defendant had the right to make that movement to the point where the supplies were kept; which request so to instruct the jury was refused by the court; to which refusal of the court so to instruct the jury the defendant, by its counsel, then and there duly excepted; and the defendant by its counsel further then and there duly excepted to the portions of the said instruction as they then stood.

Counsel for the defendant referred to that portion of the instruction which stated that if there was a combination act of fellow-servants and a violation of the law, the defendant is liable, and requested the court to modify the same; which request was refused by the court, to which refusal of the court so to modify said instruction, the defendant by its counsel then and there duly
77 excepted; and counsel for defendant then and there duly excepted to the portions of the said instruction as they then stood.

Counsel for the defendant referred to that portion of the instructions to the jury to the effect that in making up his mind what the movement of the train should be, Corrigan was not a fellow-servant, and to that portion of the instructions, to the effect that his authority as yardmaster in any manner entered into this case, and requested the court to modify the same, on the ground that whatever his position as yardmaster may have been, there was nothing under the evidence to show that that had anything to do with the accident; that he was acting at the time as a member of the switching crew, and the engine was the only engine in the territory, and there was nothing to be considered but the movement of this particular train. Which request so to modify the said instruction to the jury was refused by the court; to which refusal of the court so to modify the said instruction to the jury the defendant, by its counsel, then and there duly excepted; and counsel for the defendant then and there duly excepted to the portions of the said instructions as they then stood.

Counsel for the defendant requested the court to give the following instruction to the jury.

The plaintiff and the men working with him in the train crew, including the conductor and the engineer, were fellow-servants working together in the operation of the train in question. If you believe from the evidence that the plaintiff was injured because of any negligent act of the engineer, or of the conductor, and that this negligent act was the sole moving cause of the injury, the plaintiff cannot recover, because in law when he entered the employment of the defendant he assumed the risk of negligent acts of his fellow-employes.

But the court refused so to instruct the jury; to which refusal of the court so to instruct the jury, the defendant by its counsel then and there duly excepted.

Counsel for the defendant requested the court to give the following instruction to the jury:

If you believe from the evidence in this case that the defendant, the Chicago Junction Railway Company, used proper and reasonable care in inspecting the train in question for defective appliances, and such reasonable inspection failed to disclose the fact that
78 there was any broken knuckle at the point in question, and that the first knowledge that the Chicago Junction Railway Company had that there was a broken knuckle was when conductor Corrigan saw the knuckle a short time before the accident; and if you believe that the movement of the train from the point where it stood at the moment the broken knuckle was discovered, south towards the point where a supply of knuckles was kept, was a reasonably proper and careful movement to make under the circumstances then known to conductor Corrigan, then you are instructed that the Chicago Junction Railway Company was guilty of no negligence in attempting, by and through the orders of its conductor, to move the train to the point south, near which extra knuckles were kept on hand and where repairs could be made to the coupler.

If you find under the facts stated in the foregoing paragraph, that the movement to the south was a reasonably careful one, then you are instructed that even though you may believe the conductor or engineer was negligent in the manner in which he moved the train, still the plaintiff cannot recover, because such negligence was that of his fellow-servants.

But the court refused so to instruct the jury; to which refusal of the court so to instruct the jury, the defendant, by its counsel, then and there duly excepted.

Counsel for the defendant requested the court to give the following instruction to the jury:

If you do not find the defendant was guilty of negligence which makes it liable to the plaintiff in this suit, or if you find that the plaintiff's conduct was so careless or negligent that he cannot recover you will have no occassion to consider the question of the plaintiff's damages or whether he is entitled to compensation at all. If, under the instructions of the court and the evidence, you find that the defendant exercised proper care under the circumstances, and

that the plaintiff was guilty of negligence, then you should return a verdict of not guilty in favor of the defendant.

But the court refused so to instruct the jury; to which refusal of the court so to instruct the jury, the defendant, by its counsel, then and there duly excepted.

Counsel for the defendant requested the court to give the following instruction to the jury:

The Safety Appliance Act so-called requires railroad companies to equip their cars with safety couplers such as can
79 be operated without the necessity of a man going between the ends of the cars, and to maintain these couplers in proper condition for operation. This law does not, however, make a railroad company an absolute insurer of the safety of the couplers at all times, but only requires that the company shall use proper care and diligence to keep the couplers in repair after having put them upon the cars. If you believe from the evidence in this case that the Chicago Junction Railway Company used proper care after learning of the defective condition of the coupler, toward putting it in good order, and that the movement of the train south toward the point where the supply of extra knuckles was kept, was under the circumstances a reasonably careful thing to do, then you should find the defendant not guilty. The law does not require a railroad company to make repairs upon couplers or cars immediately upon discovering that a defect exists or that a break has occurred, unless the safety of the men handling the train requires imperatively that this should be done. If you believe from the evidence in this case that the train could have been moved south toward the point where the extra supply of knuckles was kept with a proper regard for the safety of the members of the crew and it was not the fact of the attempt to move the train, but the attempt of the plaintiff to repair the coupler himself without giving notice of his intention to the other members of the train crew, or a at least without giving them notice in such manner as to call their attention to the place where he was going and the work he was intending to do, which caused the accident, then you should find the defendant not guilty.

But the court refused so to instruct the jury; to which refusal of the court so to instruct the jury, the defendant, by its counsel, then and there duly excepted.

Counsel for the defendant requested the court to give the following instruction to the jury:

In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's railroad without setting a signal of some sort to give warning to train crews not to move engines or trains in to where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circum-
80 stances shown by the evidence, would not have gone between the cars, then the plaintiff cannot recover.

But the court refused so to instruct the jury; to which refusal of

the court so to instruct the jury the defendant by its counsel then and there duly excepted.

And thereupon the court further instructed the jury as follows: "Gentlemen of the jury: If you find for the plaintiff the form of your verdict will be, "We, the jury, find the defendant guilty and assess the plaintiff's damages against the defendant at the sum of ———," whatever amount, under the instructions of the court, you agree upon, if any.

If you find for the defendant, the form of your verdict will be "We, the jury, find the defendant not guilty."

The above and foregoing instructions given by the court to the jury were all of the instructions given by the court to the jury in said cause; and the above and foregoing instructions requested by counsel to be given by the court to the jury and refused by the court were all of the instructions requested by counsel for the said parties or either of them, and so refused by the court.

And the foregoing was all that occurred and all that was said by the attorneys for said parties or either of them in reference to the instructions or objections or exceptions thereto at any time at said trial.

And thereupon the jury retired to consider of their verdict; and afterwards, to-wit: on the 16th day of April, 1908, the jury rendered and returned into court a verdict finding the defendant guilty and assessing the plaintiff's damages in the sum of nine thousand dollars.

And thereupon the defendant by its counsel then and there moved the court to set aside the said verdict so rendered and returned, and to grant a new trial in said cause, which said motion for a new trial was duly entered and continued and is in the words and figures following, to-wit:

81 *Motion for New Trial.*

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

No. 28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Motion for a New Trial.

Now comes the defendant, the Chicago Junction Railway Company, by Winston, Payne, Strawn & Shaw, and John D. Black, its attorneys, and moves the court to set aside the verdict of the jury rendered and returned herein on to-wit: the 16th day of April, A. D. 1908, and grant a new trial of said cause, upon the following grounds, viz:

1. The court erred in admitting certain evidence offered by the plaintiff, over the objection of the defendant.

2. The court erred in refusing to admit certain evidence offered by the defendant, to which the plaintiff objected.

3. The court erred in overruling the motion of the defendant made at the close of the plaintiff's evidence, to dismiss the second and third counts of the declaration of the plaintiff, on the ground that the Safety Appliance Acts, in so far as they sought to prescribe and regulate the equipment of freight cars, were in violation of the Constitution of the United States, and unconstitutional and void, as not being a regulation of commerce among the several states.

4. The court erred in refusing, at the close of the plaintiff's evidence, to instruct the jury to find the defendant not guilty.

5. The court erred in refusing, at the conclusion of all the evidence, to instruct the jury to find the defendant not guilty.

6. The court erred in its instructions to the jury.

7. The court erred in refusing to give to the jury the instructions requested by the defendant.

8. The verdict of the jury is contrary to law.

9. The verdict of the jury is contrary to the evidence.

82 10. The damages are excessive.

11. For other errors occurring on the trial of said cause.

WINSTON, PAYNE, STRAWN & SHAW,
JOHN D. BLACK,
Attorneys for Defendant.

And thereafter, on, to-wit: the 23rd day of June, A. D. 1908, the date to which the hearing of the said motion for a new trial was continued, the said motion for a new trial was argued in open court by counsel for the respective parties, and upon consideration thereof by the court, the same was overruled. To which ruling of the court, the defendant by its counsel then and there duly excepted.

And thereupon, in open court, the said defendant, by its counsel, further moved the court to find that the verdict rendered and the damages assessed by the jury were excessive and to require the plaintiff to enter a remittitur on account of the same, or grant a new trial of said cause, which motion was overruled by the court, to which ruling of the court the defendant by its counsel then and there duly excepted.

And the defendant, by its counsel, then and there, in open court duly objected and excepted to the said verdict.

And thereupon the defendant, by its counsel, made a motion in arrest of judgment in said cause; which motion was by the court overruled; to which ruling of the court the defendant by its counsel then and there duly excepted.

And thereupon the plaintiff by his counsel moved for judgment on the verdict, and the court entered judgment on the verdict in favor of the plaintiff and against the defendant; to the entry of which judgment the defendant by its counsel then and there duly objected and excepted.

And thereupon the said defendant, by its counsel, entered its

motion for a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, and the court granted thirty days' time within which to present and file its bill of exceptions, and fixed the bond of the said defendant in the sum of ten thousand dollars.

And forasmuch as the matters and things hereinabove set forth do not fully appear of record, and to the end that the said matters and things may be and become of record, the defendant, within the time allowed by the court, tenders this its said bill of exceptions and prays that the same may be signed, sealed and allowed
83 by the Court, in pursuance of the statute in such case made and provided; all of which is accordingly done this 21 day of July, A. D. 1908.

KENESAW M. LANDIS, [SEAL.]
Judge of the District Court of the United States, Holding the Circuit Court, and Trial Judge in the Above-entitled Cause.

Approved:

——— ———,
Attorney for Plaintiff.

(Endorsed:) Filed July 21, 1908. H. S. Stoddard, Clerk.

Petition for Writ of Error.

Filed Aug. 4, 1908.

And afterwards to-wit: on the fourth day of August, 1908, come the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain petition for writ of error in words and figures following to-wit:

Petition for Writ of Error.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28752.

WILLIAM R. KING
vs
CHICAGO JUNCTION RAILWAY COMPANY.

Defendant's Petition for Writ of Error.

To the Honorable Christian C. Kohlsaat, Presiding Judge of the said Circuit Court of the United States:

Your petitioner, Chicago Junction Railway Company, by Winston, Payne, Strawn & Shaw, its attorney-, respectfully states and shows that, on, to wit, the 16th day of April, A. D. 1908, at the regular December Term, A. D. 1907, of the said Circuit Court of

the United States for the Northern District of Illinois, Eastern Division, a verdict was returned in the above entitled cause finding the defendant guilty and assessing the plaintiff's damages in the sum of nine thousand dollars ($9,000), and on to wit, the
84 23rd day of June, A. D. 1908, a final judgment was rendered and entered upon said verdict by said court in said cause against your petitioner and in favor of the said William R. King, and for costs of suit, the same being one of the regular days of said term; that in the rendition of said judgment and in the record and proceedings had at said trial, manifest error hath intervened as your petitioner is advised to its great damage, as more fully appears by the written assignment of errors which is presented and filed herewith.

And your petitioner also presents and files herewith its supersedeas bond in said cause in the sum of ten thousand dollars ($10,000), being the amount fixed by the said court, with good and sufficient surety conditioned as required by law in such cases.

Wherefore, your petitioner prays that a writ of error may be granted in said cause to the United States Circuit Court of Appeals for the Seventh Judicial Circuit as by law provided; that said bond be approved and made a supersedeas in said cause until said errors shall have been presented to and determined by the said United States Circuit Court of Appeals; that the record in said cause be ordered to be certified to said United States Circuit Court of Appeals as by law provided, to the end that the error complained of, if any have occurred, may be duly corrected and full and speedy justice be done in the premises.

CHICAGO JUNCTION RAILWAY COMPANY,
Defendant.

By WINSTON, PAYNE, STRAWN & SHAW,
Its Attorneys in said Cause.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

(Endorsed:) Filed August 4, 1908. H. S. Stoddard, Clerk.

Assignment of Errors.

And on the same day to-wit: the fourth day of August, 1908, come the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain assignment of errors in words and figures following to-wit:

85 Assignment of Errors.

Filed Aug. 4, 1908.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Assignment of Errors.

Now comes the defendant, the Chicago Junction Railway Company, a corporation, and says that there is manifest error on the face of the Record in the above entitled cause in the following particulars, to-wit:

1. The court erred in admitting in evidence the paper drawing offered by the plaintiff and marked "Plaintiff's Exhibit A", and testimony based on the same, on the ground that the same is inaccurate, incomplete and not of any value in arriving at the facts sought to be proven by the said paper drawing and the testimony based on the same.

2. The court erred in admitting evidence offered by the plaintiff on the fact as to whether or not the crew in charge of the engine were accustomed to carrying knuckles on the engine, on the ground that there was no charge in the declaration of any such custom, that the evidence offered of such custom was not material, and the defendant was taken by surprise by such evidence.

3. The court erred in admitting evidence offered by the plaintiff on the custom of blowing the whistle preceding train and engine movements, and the custom for the engineer to blow the whistle when he made every movement, and whether or not the bell was rung before this car moved; and what the custom was, if there was a custom, among the switchmen of that road and that crew, as to what they do when they discover a knuckle broken; on the ground that there was no allegation or charge in the declaration, on which the plaintiff relied, of any custom of blowing the whistle or ringing the bell or replacing broken knuckles.

4. That the defendant was prejudiced by the following language by counsel for the plaintiff in the presence and hearing of the
86 jury in his argument on the admissibility of evidence of the fact of whether or not the crew were accustomed to carry knuckles on the engine, viz: "Mr. Corrigan ought to have gone and got the knuckle there too, it seems to me, and they carried these things and that is what it is for; it is a part of this case, this whole situation, that, when he found it was missing he knew they carried them there, and he went back there after it." And that the defendant was prejudiced by the following language used by counsel

for plaintiff in the presence and hearing of the jury in his argument on the admissibility of evidence of the custom of blowing the whistle, viz: "They do not blow the whistle when there is no reason to apprehend someone is between the cars. This is with a view of showing the engineer did apprehend that. I understand it is not the rule to blow the whistle whenever the engine starts up. It is just a custom of railroading. Ordinarily they do not blow any whistle, but if there is reasonable apprehension that a man may be in there they also toot the whistle. That is my understanding. That is why I want to show your honor."

Because the language so used by counsel was such as to impress the jury with the facts therein claimed, which were not proved and did not exist in the case.

5. The court erred in admitting evidence offered by the planitiff to the effect that the plaintiff and his wife were conducting a grocery and notion store at 26th and Halsted streets, Chicago; that the plaintiff had not earned anything in the conduct of said store above his expenses; that there had been no net earnings or profits in the conduct of said store and that the plaintiff had drawn money out of the bank and put into said store to conduct it; that the value of the stock in the store wa sworth $700 in April 1908; that it was worth $400 in August, 1907; that in August, 1907, the plaintiff put $400 in the business and since August, 1907, he had put $300 in cash in the business; that the plaintiff had drawn $50 a month from the bank for every month since August, 1907, being a fund from the Trainmen's Association and put it into the store; and that the said $50 a month was money which had not been earned in the store; that the money the plaintiff drew from the bank and put in the business is represented by increased stock; that the plaintiff drew from the business for the support of himself and wife between $35 and $40 per month.

87 Because the evidence so admitted was not material to this cause, and was not proper evidence for the jury to consider in estimating damages.

6. The court erred in not dismissing, on motion duly made after the plaintiff had rested his cause the second and third counts of the declaration, and in not holding that the Acts of Congress of the United States known as the "Safety Appliance Acts," upon which said second and third counts of the declaration were based, in so far as they seek to prescribe and regulate the equipment of freight cars, were in violation of the Constitution of the United States and unconstitutional and void, because to prescribe and regulate the equipment of freight cars, as prescribed by said "Safety Appliance Acts" is not a regulation of commerce among the several states.

7. The court erred in overruling the motion of the defendant, at the close of the plaintiff's evidence and after the plaintiff had rested his case, to instruct the jury to find the defendant not guilty, on the ground that the evidence showed that the plaintiff was guilty of such contributory negligence as to preclude his recovery against the

defendant, and the further ground that the injury to the plaintiff was caused by the acts of a fellow servant or fellow servants.

8. The court erred in admitting evidence on the cross examination of the witness Corrigan, when the said witness was asked if he recalled, during the time the plaintiff was switching in the yards of the defendant, of any other occasion when the crew shoved a train that had a knuckle broken down into the yards from the point where the accident happened; and whether or not the train could be pushed down with a knuckle broken or without a coupler of any kind; on the ground that it was immaterial whether they had on any other occasion shoved such a train down into the yards and that it was immaterial whether or not they could push the train down with a broken knuckle or without any coupler.

9. The court erred in permitting the plaintiff to show on the cross examination of the witness E. J. Constant that there was a skeleton knuckle that could be used temporarily in the place of any knuckles broken on a car, on the ground that the plaintiff had already stated that there was such a knuckle but that it was not customary to carry it on engines and that he knew there was not one on this engine.

10. The court erred in refusing to allow the defendant to prove, after the plaintiff had testified to the custom to invariably make repairs at the point where the break was discovered, that there
88 was no such custom, it being intended by such proof to meet the flat testimony of the plaintiff in that behalf.

11. The court erred in refusing, at the close of all the evidence, to instruct the jury to find the defendant, Chicago Junction Railway Company, not guilty, on the ground that the evidence showed that the plaintiff was guilty of such contributory negligence as to preclude his recovery against the defendant, and the further ground that the injury to the plaintiff was caused by the acts of fellow servant or fellow servants.

12. The court erred in not instructing the jury, upon request of counsel for the defendant, that in connection with the question of liability the amount of damages suffered by the plaintiff is not to be considered unless and until the jury determines that *that* the defendant is liable to the plaintiff, that the question of liability must first be determined before the amount of the damages may be considered.

13. The court erred in instructing the jury as follows, viz:

In passing upon the question as to whether the plaintiff should or should not have anticipated that the cars were or might be brought together while he was adjusting the coupler, he had the right to assume, in the absence of express or implied notice to the contrary, that the engineer and conductor would act with due care in the performance of their respective duties, and he was not guilty of negligence in not anticipating that either the conductor or engineer would be guilty of negligence, but, on the contrary, in the absence of such notice he had the right to act upon the presumption that they, and each of them, would exercise ordinary care in the performance of their respective duties.

Because it is immaterial if the injury in fact resulted solely from

the engineer's negligent act; that the presumption was immaterial if the engineer and the plaintiff were fellow servants.

14. The court erred in instructing the jury as follows, viz:

Now, when Corrigan discovered that the coupler was in such defective condition that it was necessary for a switchman to go between the ends of the cars to replace the knuckle, in order that the cars might be coupled,—that it was necessary for a switchman or other person to go between the ends of the cars to replace the knuckle in order that the cars might be coupled,—it was his duty not to haul or use the car while the coupler was in that condition, unless
89 there was a necessity for so doing, and if it was reasonably practicable in the prosecution of the defendant's business for him to have repaired the coupler or have it repaired where the car stood, it was his duty to do so; and the mere fact that it was more convenient for him to repair the knuckle at the place where the evidence shows he intended to repair it, did not justify him in unnecessarily removing the car in its then condition to that place.

Because it does not correctly state, but understates, the legal right which the defendant had to move the car to make the repairs; and the instruction should have been modified, as requested by the defendant, to the effect that if it was a proper railroading proposition that the car could be repaired sufficiently by the movement to where supplies were kept, that if that was a reasonable thing to do, the defendant had the right to make that movement to the place where the supplies were kept.

15. The court erred in giving the following instruction to the jury and in refusing to modify the same, viz:

If his (the plaintiff's) injury was the result of the defendant's failure to obey this law of Congress and also the negligence of a fellow servant of the plaintiff, the plaintiff is entitled to recover in this case.

Because the instruction to the effect that if the injury was the result of the defendant's failure to obey the Act of Congress and also the negligence of a fellow servant, was not, and is not, a correct statement of the law, and such statement of the law is erroneous and prejudicial to the defendant.

16. The court erred in giving the following instruction to the jury, viz:

On the evidence in this case the court charges you that Corrigan who has testified here as a witness, was not a fellow servant of this plaintiff in respect to the question of determining whether or not the car with the defective coupler should be repaired or not before it was removed.

Because the court abused its discretion in thus commenting upon the facts in the case prejudicial to the defendant, and because the said instruction does not contain a correct statement of the facts and law of the case, it appearing from the evidence that whatever the position of Corrigan as yardmaster may have been, there was nothing under the evidence to show that his position as yardmaster
90 had anything to do with the accident; that he was acting at the time as a member of the switching crew and the engine

was the only engine in that territory, and there was nothing to be considered but the movement of this particular train.

17. The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

The plaintiff and the men working with him in the train crew, including the conductor and the engineer, were fellow servants working together in the operation of the train in question. If you believe from the evidence that the plaintiff was injured because of any negligent act of the engineer, or of the conductor, and that this negligent act was the sole moving cause of the injury, the plaintiff cannot recover, because in law when he entered the employment of the defendant he assumed the risk of negligent acts of his fellow employés.

Because according to the evidence and the law the plaintiff was a fellow servant with the conductor and engineer in the operation of the train.

18. The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

If you believe from the evidence in this case that the defendant, the Chicago Junction Railway Company, used proper and reasonable care in inspecting the train in question for defective appliances, and such reasonable inspection failed to disclose the fact that there was any broken knuckle at the point in question, and that the first knowledge that the Chicago Junction Railway Company had that there was a broken knuckle was when Conductor Corrigan saw the knuckle a short time before the accident; and if you believe that the movement of the train from the point where it stood at the moment the broken knuckle was discovered, south towards the point where a supply of knuckles was kept, was a reasonable proper and careful movement to make under the circumstances then known to Conductor Corrigan, then you are instructed that the Chicago Junction Railway Company was guilty of no negligence in attempting, by and through the orders of its conductor, to move the train to the point south, near which extra knuckles were kept on hand and where repairs could be made to the coupler.

If you find under the facts stated in the foregoing paragraph, that the movement to the south was a reasonably careful one,
91 then you are instructed that even though you may believe that the Conductor or engineer was negligent in the manner in which he moved the train, still the plaintiff cannot recover, because such negligence was that of his fellow servants.

Because the said instruction states correctly the degree of care for which the defendant was liable to the plaintiff and the facts and circumstances upon which such degree of care must be based; and because further the plaintiff and the conductor and engineer were fellow servants.

19. The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

If you do not find the defendant was guilty of negligence which makes it liable to the plaintiff in this suit, or if you find that the plaintiff's conduct was so careless or negligent that he cannot recover, you will have no occasion to consider the question of the plaintiff's damages or whether he is entitled to compensation at all. If under

the instructions of the court and the evidence, you find that the defendant exercised proper care under the circumstances, and that the plaintiff was guilty of negligence, then you should return a verdict of not guilty in favor of the defendant.

20. The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

The Safety Appliance Act so-called requires railroad companies to equip their cars with safety couplers such as can be operated without the necessity of a man going between the ends of the cars, and to maintain these couplers in proper condition for operation. This law does not, however, make a railroad company an absolute insurer of the safety of the couplers at all times, but only requires that the company shall use proper care and diligence to keep the couplers in repair after having put them upon the cars. If you believe from the evidence in this case that the Chicago Junction Railway Company used proper care after learning of the defective condition of the coupler toward putting it in good order, and that the movement of the train south toward the point where the supply of extra knuckles was kept, was under the circumstances a reasonably careful thing to do, then you should find the defendant not guilty. The law does not require a railroad company to make repairs upon couplers or cars immediately upon discovering that a defect exists or that a break has occurred, unless the safety of the men handling the train requires imperatively that this should be done. If you believe
92 from the evidence in this case that the train could have been moved south toward the point where the extra supply of knuckles was kept with a proper regard for the safety of the members of the crew and it was not the fact of the attempt to move the train, but the attempt of the plaintiff to repair the coupler himself without giving notice of his intention to the other members of the train crew, or at least without giving them notice in such manner as to call their attention to the place where he was going and the work he was inteding to do, which caused the accident, then you should find the defendant not guilty.

Because the said instruction sets forth the duties imposed upon the said defendant by the Safety Appliance Acts in the management of trains, and the relation of the railroad company to its employés under said Acts.

21. The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's railroad, without setting a signal of some sort to give warning to train crews not to move engines or trains in to where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circumstances shown by the evidence would not have gone between the cars, then the plaintiff cannot recover.

22. The court erred in refusing to grant the motion for a new trial filed by the defendant.

23. The court erred in refusing to find that the verdict rendered and the damages assessed by the jury were excessive and to require the plaintiff to enter a remittitur on account of the same or grant a new trial.

24. The court erred in refusing to grant the motion in arrest of judgment made by the defendant.

To all of which errors of the court, the court duly allowed exceptions, before and at the time that each of said errors was committed.

Wherefore, said defendant prays that the judgment aforesaid may be reversed, vacated and annulled or modified, by reason of
93 the foregoing errors, and that it may be restored to all things which it has lost by reason of said judgment.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

(Endorsed:) Filed August 4, 1908. H. S. Stoddard, Clerk.

Order of Aug. 4, 1908, Allowing Writ of Error.

And on the same day to-wit: the fourth day of August, being one of the days of the regular July term of said court, 1908, in record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of August 4, 1908, Allowing Writ of Error.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

Pursuant to the prayer of the foregoing petition, a writ of error is allowed in said cause to the United States Circuit Court of Appeals within and for the Seventh Judicial Circuit and a supersedeas is also allowed as therein prayed, all in open court, on this fourth day of August, 1908.

And on the same day to-wit: the fourth day of August, 1908, come the Chicago Junction Railway Company, as principal and John A. Spoor as surety and filed in the clerk's office of said Court a certain bond on writ of error in words and figures following to-wit:

Bond on Writ of Error.

Filed Aug. 4, 1908.

Bond on Writ of Error.

Know all men by these presents that the Chicago Junction Railway Company, a corporation, as principal, and John A. Spoor, as

surety, are held and firmly bound unto William R. King in the full and just sum of ten thousand dollars ($10,000), to be paid to the said William R. King, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we
94 bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this fourth day of August, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division thereof, in a suit pending in said Court, between said William R. King, plaintiff, and said Chicago Junction Railway Company, defendant, a judgment was rendered against the said Chicago Junction Railway Company for the sum of nine thousand dollars ($9,000) and costs; and the said Chicago Junction Railway Company having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William R. King, citing and admonishing him to be and appear at the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such that if the said Chicago Junction Railway Company shall prosecute its said writ to effect, and shall answer all damages and costs that may be awarded against it, if it fail to make its plea good, then the above obligation to be void; otherwise in full force and virtue.

CHICAGO JUNCTION RAILWAY COMPANY,
By J. A. SPOOR, *Its President.*

Attest:
H. E. PORONTO, *Secretary.*

J. A. SPOOR.

Approved Aug. 4, 1908.
KOHLSAAT, *J.*

(Endorsed:) Filed August 4, 1908. H. S. Stoddard, Clerk.

95 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between William R. King, Plaintiff, and Chicago Junction Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Chicago Junction Railway Company, as by its complaint appears. We being willing that

error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of August, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] H. S. STODDARD,
Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.

Allowed by
[SEAL.] CHRISTIAN C. KOHLSAAT, *Judge.*

96 *Return to Writ of Error.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 14th day of August A. D. 1908.

[SEAL.] H. S. STODDARD,
Clerk United States Circuit Court, Northern District of Illinois.

(Endorsed:) Writ of Error. Filed Aug. 4, 1908. H. S. Stoddard, Clerk.

Præcipe for Record.

Filed Aug. 10, 1908.

Præcipe for Record.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28752.

WILLIAM R. KING
vs.
CHICAGO JUNCTION RAILWAY COMPANY.

To the Clerk of the above entitled Court:

You will please prepare transcript of record in this cause; to be filed in the office of the clerk of the United States Circuit Court of

Appeals for the Seventh Judicial Circuit, under the writ of error heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Transcript of record from Superior Court of Cook County.
Plea,
Order of April 10, 1908
Order of April 13, 1908, called for trial and jury sworn.
Order of April 14, 1908 evidence for plaintiff heard and concluded.
97 Order of April 15, 1908, evidence for def't, heard and concluded.
Order of April 16, 1908, verdict for the plaintiff.
Judgment of June 23, 1908.
Bill of Exceptions.
Petition for writ of error.
Assignment of errors.
Order of August 4, 1908, allowing writ of error.
Bond on writ of error.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

(Endorsed:) Filed August 10, 1908. H. S. Stoddard, Clerk.

Certificate of Clerk.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, H. S. Stoddard, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Transcript of the proceedings had of record in said Court, made in accordance with Præcipe filed in the cause wherein William R. King is the plaintiff and Chicago Junction Railway Company, is the Defendant, as the same appears from the original now remaining in my custody and control.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 14th day of August A. D. 1908.

[SEAL.] H. S. STODDARD, *Clerk.*

98 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William R. King, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein Chicago Junction Railway Company, is the plaintiff in error, and you are defendant in error to show cause, if any there be, why the Judgment rendered against the said Plain-

tiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, Judge of the Circuit Court of the United States, this fourth day of August, in the year of our Lord one thousand nine hundred and eight.

KOHLSAAT, *J.*

Service of the within citation is hereby accepted by Wm. R. King, defendant in Error this 4th day of August A. D. 1908.

JAMES C. McSHANE,
Att'y for Wm. R. King.

(Endorsed:) Citation. Returnable Sep. 1908. H. S. Stoddard, Clerk. Circuit Court of the United States Northern District of Illinois Eastern Division Filed Aug. 4—1908 H. S. Stoddard, Clerk.

99 & 100 At a Regular Term of the United States Circuit Court of Appeals, Begun and Held at the United States Court Rooms in the City of Chicago, in said Seventh Circuit, on the First Day of October, A. D. Nineteen Hundred and Seven, of the October Term, in the Year of Our Lord, One Thousand Nine Hundred and Seven, and of Our Independence, the One Hundred and Thirty-second.

And afterwards, to-wit: On the fourteenth day of August, 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Stipulation, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM R. KING, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the Clerk of this court in printing the record in said cause need not print the three photographic exhibits of the plaintiff in error; that the plaintiff in error will furnish to the Clerk of this court six copies of each
101 of the said three photographic exhibits, and that the same may be used by the court and counsel at the hearing of said cause in lieu of the copies which would otherwise be printed.

JOHN BARTON PAYNE,
JOHN D. BLACK,
Attorneys for Plaintiff in Error.
JAMES C. McSHANE,
Attorney for Defendant in Error.

Endorsed: Filed Aug. 14, 1908. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the fourteenth day of August, 1908, in the October Term last aforesaid, came the Plaintiff in Error by its counsel, Mr. Frederick S. Winston and Mr. John D. Black, and filed in the office of the clerk of this Court their appearance, which is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1907.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

The Clerk will enter *my* appearance as counsel for the plaintiff in error, Chicago Junction Railway Company.

FREDERICK S. WINSTON.
JOHN D. BLACK.

Endorsed: Filed Aug. 14, 1908. Edward M. Holloway, Clerk.

102 And afterwards, to-wit: On the fourteenth day of September, 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, a certain Stipulation, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1907.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM R. KING, Defendant in Error.

It is hereby stipulated and agreed by and between counsel for Plaintiff in Error and counsel for Defendant in Error, that the time for the filing of briefs by Plaintiff in Error may be extended to and including September 19, 1908. This stipulation shall in no wise change the call of the case on the calendar.

JOHN BARTON PAYNE,
JOHN D. BLACK,
Counsel for Plaintiff in Error.
JAMES C. McSHANE,
Counsel for Defendant in Error.

O. K.
KOHLSAAT, *J.*

Endorsed: Filed Sep. 14, 1908. Edward M. Holloway, Clerk.

TUESDAY, *October* 6, 1908.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Sixth Day of October, One Thousand Nine Hundred and Eight, of the October Term, in the Year of Our Lord One
103 Thousand Nine Hundred and Eight, and of Our Independence, the One Hundred and Thirty-third Year.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before:

Hon. Peter S. Grosscup, Circuit Judge.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on November 6, 1908.

And afterwards, to-wit: On the sixth day of November, 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *November* 6, 1908.

Court met pursuant to adjournment and was opened by proclamation of crier.

104 Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1520.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. John D. Black, counsel for plaintiff in error, and by Mr. James C. McShane, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the third day of February, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, the Opinion of the Court in this cause, which Opinion is in the words and figures following, to-wit:

105 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, A. D. 1908.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
v.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker and Seaman, Circuit Judges.

Defendant in error as plaintiff below recovered judgment for damages on account of personal injuries. The two counts on which the case was submitted to the jury were based on an alleged violation of the Safety Appliance Acts. 27 Stat. L. 531, 29 Stat. L. 85, 32 Stat. L. 943. In one count it was alleged that the defendant, an interstate carrier, "negligently, unlawfully and contrary to the statutes of the United States in such case made and provided, hauled and used upon its said railway line and certain tracks connected therewith in moving interstate traffic, a certain car equipped with a certain automatic coupler, which said coupler, the plaintiff alleges, was then and there in such a defective, broken and inoperative condition of repair that it could not be coupled from the side of said car without the necessity of its switchman going between the end of said car and the car to which it was to be coupled; and the plaintiff further alleges that it then and there became his duty to the defendant as such switchman to couple said car so equipped with said defective,

broken and inoperative coupler, onto a certain other car then standing upon the same track and but, to-wit: a few feet from it, and as a direct result and in consequence of said defective, broken and inoperative condition of said coupler he was then and there required to and did go between the ends of said cars for the purpose of repairing and adjusting said defective and inoperative coupler, so that said cars could be coupled together, and while he was so between the ends of said cars for the purpose and engaged in the work aforesaid, and while, as he alleges, he was exercising ordinary care and caution for his own safety, said cars were then and there shoved together, and as a direct result and in consequence of his being so required to go and be between the ends of said cars as aforesaid, his right hand and wrist and arm were thereby then and there caught between said couplers and cars." The other count contained additional allegations to the effect that the engineer knew or ought to have known that plaintiff was between the cars and negligently moved the cars without giving plaintiff warning.

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Questions regarding the applicability of the statute, the character of the conduct of the parties, and the correctness of certain instructions require that a summary of the evidence be given; and we adopt for the most part the statement given by counsel for the railway company.

Plaintiff had been employed by defendant for a year and a half as switchman in the Union Stock Yards district in the City of Chicago; he had worked for three months prior to the accident with the same crew, consisting of engineer, fireman, conductor, rear switchman and head switchman; he was the head switchman and it was his duty to follow the engine.

In the Union Stock Yards there were several different sets of tracks known by different names and each constituted a different switching division. Plaintiff had worked at different times on all of these tracks, but for about three months prior to the accident he had switched up and down the Packingtown tracks, which consist of two tracks called the "east and west main tracks" running north and south from 40th street to 47th street, and platform tracks and side tracks running at short intervals in both directions from these main tracks into different industries and switching yards. About three times a day during this time plaintiff's crew went for cars to the north end of the Packingtown west main track and shoved them south and distributed them over these different side tracks. The great bulk of business from that point was toward the south. The engine usually worked from the north end of the train, upon the west main track, but occasionally when that track was blocked would go over onto the east main track to do the same business. The business was purely a switching business.

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The accident occurred December 7, 1906, between nine and ten o'clock in the morning. A train consisting of fourteen or fifteen freight cars, including car No. 6189 of the Armour Refrigerator Line, was standing on the north end of the Packingtown west main track for about an hour before nine o'clock. The south car was several car lengths north of a street crossing known as "Exchange

avenue." The engine with which plaintiff was working came from the south on the east main track without cars attached, and at about the north end of the cars standing on the west main track followed the curve in the track to the northwest to a switch clear around the curve, and then came back east and south through the switch onto the west main track where plaintiff made a coupling of the engine with the north end of the standing train. The conductor, Corrigan, had gotten off the engine at Exchange avenue to walk north along the standing cars and take the number of the cars and to learn where they were to be switched. The rear brakeman, Shaw, stayed with the engine until about the time the coupling was made. Shaw gave a signal to the engineer to go back north, at which time Shaw discovered that the train was cut in two, six cars from the engine. He thought conductor Corrigan had made the cut there as the fifth and sixth cars from the engine were for delivery to Nelson Morris & Company at a point northeast of where the train was standing. The six cars were pulled back northwest around the curve and then shoved east onto the Nelson Morris & Company track where the fifth and sixth cars were cut off and the engine with the four remaining cars attached went back again to the switch and shoved the four cars in again on the west main Packingtown track. Shaw rode on top of the fourth car from the engine and plaintiff stood on top of the car next to the engine. As the four cars approached the standing train Shaw gave a signal to stop, and just before the cars came in contact he saw that the knuckle upon the north car of the standing train was broken. This was Armour Refrigerator Line car 6189.

Up to that time Shaw had no knowledge that the coupler was broken. Conductor Corrigan also did not learn of the broken knuckle until that time. The conductor was then standing on the ground at a point near the opening between the cars in the standing train and the cars attached to the engine. Corrigan and
108 Shaw examined the broken knuckle and found that it was a new break at the point where the knuckle fitted into the lock which held the knuckle shut after the cars were coupled. The front part of the knuckle was in the same condition as though there had been no break and there was nothing about the character of the break to prevent the car from being shoved further south.

Corrigan was assistant yard master as well as the conductor of this particular train, and he testified that he had authority to decide what to do with the car. He decided to shove it south to a repair shop belonging to Armour & Company, known as the "Old Lipton House," which was about three blocks south of the point where these cars stood and where a supply of knuckles of this type were kept, in order to get a knuckle to fit into the coupler. He testified that he could have repaired the car where it stood, but thought it more convenient to move the car. He walked south along the tracks to line up the switches for this movement, and Shaw went to the south end of the train and got up onto the last car so as to signal the engineer when the switches had been set.

A short distance south of Exchange avenue Corrigan met a car inspector for Armour & Company, one Tony Tozinski, and told Tony

there was a broken knuckle on an Armour Refrigerator car and that they were going to shove the train down; and asked Tony to get a good knuckle to replace it. Tony said that he would get it. He went to the car, looked at the coupler, found that it was a new Gould coupler with a fresh break across the tongue and went back to his repair shanty and got another knuckle.

Plaintiff from the top of the car next to the engine saw Corrigan and Shaw talking, but did not know what they were doing, and remained on the car until he saw Corrigan walk down toward Exchange avenue to throw the switches. He knew that throwing the switches in this manner was the regular thing in switching south. He also saw Shaw walk down towards Exchange avenue. Plaintiff then walked down to where he had seen Corrigan and Shaw talking, and saw the opening between the cars and the broken knuckle. There was testimony, including that of Corrigan, that it was customary for brakemen on defendant's road whenever they found defects in couplers to repair them if they could. Plaintiff saw that the defect was in a Gould Improved Knuckle and remembered that there was a knuckle of this description lying on the front end
109 of the engine, which plaintiff had himself picked up alongside the track and placed there a short time before. Neither Corrigan nor Shaw knew that this knuckle was on the engine, and Corrigan did not know of any knuckle of that type nearer than the Lipton repair yard. There are ninety-seven different catalogued varieties of knuckles, which are not interchangeable, and will not work properly in any coupler except those of which they are especially designed as a part, and they are of varying weights. The weight of the knuckle of the Gould Improved Knuckle is fifty-one pounds. The testimony was conflicting in regard to there being a custom on defendant's road to carry a variety of these knuckles for repair purposes upon the front end of engines. The space on the front of the engine was four to five feet across and two to three feet wide.

Plaintiff walked up the west side of the train toward the engine for the purpose of getting the knuckle which he had placed there. On the next track west, parallel to the track upon which his train stood, a train of loaded coal cars was standing, and these cars also extended around the curve to the northwest. The space between the two trains was not more than three or four feet. They were so close to the train to which the engine was attached that the switchman could not see the engine from the point where the broken knuckle was, on account of the curve in the track; nor could the engineer see the point where the knuckle was located.

When plaintiff reached the engine he had no talk with anybody; the engine pump was working and making a noise and there was a stock-train pulling out which made quite a noise. As to what took place at the engine the bill of exceptions is as follows: "I stepped up on the foot-board, reached across and pulled the knuckle across to me, and then reached my left hand up and waved it like that (indicating), and the engineer saw it and looked right at me. I took hold of the knuckle and held it up and motioned like that (indicat-

ing). It was about 12 or 14 feet from the engineer's windows to the front end of the engine, where I stood at the time. I never measured the distance. The engineer was on the west side of the engine, which is his side. I then went down to the opening with the knuckle."

Upon reaching the point where the break was, plaintiff took out the old knuckle and put the new one in place and while reaching for
the pin to make the new knuckle fast the car north of him
110 was shoved south by the engine and his hand was caught. At
almost the same time he heard a blast of the whistle.

Neither the conductor, nor the rear brakeman, nor the engineer, nor the fireman saw plaintiff at any time while he was attempting to replace the broken knuckle, and he did not tell any of them of his intention to make the replacement, unless plaintiff's signs to the engineer informed him. The conductor, the rear brakeman and the fireman testified at the trial. The engineer died some months before the trial. The signal for the movement of the train which resulted in the injury to plaintiff was given by conductor Corrigan after he had lined up the switches in the yard, to the rear brakeman, Shaw, who transmitted them to the engineer. The fireman testified that two whistles were blown by the engineer before the engine started to move, and plaintiff and a track laborer, Patrick Shaw, testified that they heard the whistle signals at about the same time that the train started to move.

When the accident occurred, plaintiff cried out, and switchman Shaw hearing the shout gave a signal to the engineer to stop the train, which moved only twenty feet. Shortly afterwards the car inspector, Tony, returned with the new knuckle and replaced it in the car as the train stood where it had been brought to a stop.

It was stipulated at the trial that Armour Refrigerator Line car 6189 was delivered to defendant during the morning of December 6 at a point about three-quarters of a mile distant from the place of this accident; that a car inspector of defendant inspected it at about four o'clock in the morning of December 6 and examined the couplings to see if they were in proper order and discovered no defect; that a number taker of defendant took a car record of a train in which this car was moving at nine o'clock in the morning of December 7, the day of the accident, and that the train showed no break or opening at any point at that time. John W. Boland, a conductor for defendant, testified that he was in charge of the engine which moved the train containing this car onto the Packingtown west main track on the morning of December 7; that he had no report, record or recollection of discovering a broken coupler on the train and that in the regular course of business, if a break had been discovered, a report would have been made of it.

A part of the court's charge to the jury was as follows:

"Now, when Corrigan discovered that the coupler was in such de-
fective condition that it was necessary for a switchman to go
111 between the ends of the cars to replace the knuckle in order
that the cars might be coupled—that it was necessary for a switchman or other person to go between the ends of the cars to re-

place the knuckle in order that the cars might be coupled, it was his duty not to haul or use the car while the coupler was in that condition unless there was a necessity for so doing, and if it was reasonably practicable in the prosecution of the defendant's business for him to have repaired the coupler or had it repaired where the car stood, it was his duty to do so; and the mere fact that it was more convenient for him to repair the knuckle at the place where the evidence shows he intended to repair it did not justify him in unnecessarily moving the car in its then condition to that place."

Opposed to this, defendant requested an instruction "that if it was a proper railroading proposition that the car could be repaired sufficiently by the movement to where supplies were kept, that if that was a reasonable thing to do, the defendant had the right to make that movement."

In another part of the charge the court told the jury that "Ordinarily the conductor, engineer, fireman and switchman of a train are fellow-servants and ordinarily neither can recover damages from the employer on account of an injury occasioned by either of the others; but in this case if you believe from the evidence that the authority which the defendant conferred upon Corrigan as conductor of the train in question, as assistant yardmaster, authorized and empowered him to decide whether to repair the coupler or have it repaired where the car stood, when he discovered it was broken, or to remove the car to another place for repair—and I charge you that the evidence in this case shows that Corrigan did have such authority—then Corrigan, in deciding which one of the two courses he would follow, was in that respect not a fellow-servant of the plaintiff, but was a direct representative of the defendant company in that regard, and his action and conduct in that respect was in law the action and conduct of the defendant company."

Under various assignments of error the contentions for reversal are (1) that the Safety Appliance Acts are unconstitutional, (2) that the Acts do not apply to the car movement disclosed by the evidence, (3) that plaintiff in doing the work of repairing a
112 coupler was not within the protection of the Acts, the coupler provisions of which were designed only for those who are engaged in the work of coupling and uncoupling cars, (4) that plaintiff was guilty of contributory negligence as a matter of law on the undisputed facts, (5) that plaintiff's injury was caused or contributed to by the negligence of fellow-servants and therefore no recovery was permissible, (6) that error was committed in giving and refusing instructions, and (7) that plaintiff's counsel in argument to the court on the admissibility of testimony made improper and prejudicial statements in the presence and within the hearing of the jury.

Baker, Circuit Judge, delivered the opinion of the court.

In Wabash R. Co. v. U. S. and Elkin, etc., R. Co. v. U. S., herewith decided, we have expressed our judgment that the Safety Appliance Acts are constitutional.

Was the car movement in question unlawful? From the acts of

plaintiff and of the car-repairer Tony in bringing new parts to the place where the defective car stood, the jury were justified in finding that it was reasonably practicable to make the repairs without moving the car. Corrigan decided in favor of pushing the car to the place of supplies because he thought that there the repairs could more conveniently be made. The movement that was intended and under way when the plaintiff was caught, was of a defective interstate car in connection with other cars on an interstate highway, and so was within the letter of the original act of 1893 as well as of the interpretative amendment of 1903. Now if the exercise of reasonable care in maintaining the statutory standard of equipment will not exempt a car movement as being beyond the spirit, and therefore the reach, of the statute (St. Louis & Iron Mountain R. Co. v. Taylor, 210 U. S. 281; Chicago, Milwaukee & St. Paul R. Co. v. U. S., Fed. —, decided Nov. 27, 1908; U. S. v. Atchison, Topeka & Santa Fe R. Co., 163 Fed. 517; U. S. v. Denver & Rio Grande R. Co., 163 Fed. 519), much less will mere convenience be accepted as an excuse. Whether or not "overwhelming necessity" (Bishop on Stat. Crimes, § 132, 3rd ed.; 1 Wharton's Cr. L., § 95) would be available as a ground of exemption is a question not properly arising on this record.

There was evidence to support a finding that it was within
113 the scope of plaintiff's duty to endeavor to repair the coupler so that the train might be put together and the crew proceed with their work of distributing the cars. According to this view plaintiff's act in substituting a new knuckle for the broken one in preparation for a coupling by impact was quite similar to Voelker's (Chicago, M. & St. P. R. Co. v. Voelker, 129 Fed. 522) in adjusting a defective coupler so that it would couple automatically. But we find nothing in the statute that limits the classes of persons to whom the carrier shall be responsible for damages that result directly and immediately from its illegal doings.

Section 8 provides that "any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned." The statute would be honored only in its breach if the same facts that would defeat the employee under the common law rule of assumed risk can be used to defeat him under the name of contributory negligence. Schlemmer v. Buffalo etc. R. Co., 205 U. S. 1. So plaintiff's knowledge of the physical conditions can not be charged against him in determining the quality of his conduct in going and being between the cars. And since he could not be crushed between quiescent cars, his knowledge that at every instant of time there was the possibility of the cars being moved by the act or direction of other employees, is likewise irrelevant. The inquiry, in our opinion, is limited to whether other facts, independent of his knowledge of conditions and possibilities as aforesaid, estabish plaintiff's negligence so conclusively that it was error to submit the matter to the jury as a question of fact. Plaintiff observed the conductor and rear brakeman talking together at the

opening between the cars. When he went to the place he saw the broken knuckle. The jury might well have inferred from this that plaintiff believed and had reason to believe that the conductor and rear brakeman knew of the defect and therefore of the unlawfulness of moving the car in that condition as a matter of mere convenience. The engineer, on account of the curve in the track and the other cars, could not see the opening. But he saw plaintiff carry a knuckle back along his train. Plaintiff made certain signs to the engineer.

Before judge and jury plaintiff reproduced the pantomime.

114 This is not preserved in the bill of exceptions. Defendant, having the burden here, therefore fails to show that there was no evidence from which the jury might warrantably have found that plaintiff believed and had reason to believe that the engineer knew that plaintiff was about to replace a broken knuckle somewhere in the train and that it would be negligent, if not criminal, to move the train meanwhile. Under such circumstances plaintiff would have the right to assume, until he had some notice to the contrary, that the conductor would not order the train to be moved and that the engineer would not start the locomotive. Contention is made that plaintiff was negligent because he did not put out car-repairers' flags, for which a rule of the company provided. The purpose of such flags is to give notice that the car being repaired should not be moved. There was testimony that the rule was not applicable to situations like that disclosed in this case. Besides, if the posting of flags would not have further advised the engineer and conductor of their duty not to move the train, the jury presumably determined that the failure to post did not contribute to the injury. We conclude that the evidence in its entirety justified the submission of the issues to the jury.

Upon the carrier the statute lays the duty of seeing to it that no cars are hauled or used on its line that are not equipped according to the statutory requirements. This direct statutory duty can not be evaded by assignment or otherwise. Therefore the act of the conductor who had charge of the train in deciding what should be done with the defective car was the act of defendant. As to the negligence of the engineer it is immaterial whether it be taken as that of defendant or of a fellow servant of plaintiff, for defendant can not be exempted from liability for its own negligence by reason of the concurrence of another's. Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377; Monmouth, M. & M. Co. v. Erling, 148 Ill. 533; So. Pac. Co. v. Allen (Tex.), 106 S. W. Rep. 443.

That the instructions respecting fellow servants and the nature of the duty imposed by the statute are deemed by us to be correct, sufficiently appears from our consideration of the case upon the evidence. Defendant's other requests need not be particularly noticed, for on comparison of them with the charge as given we find that they were substantially covered.

115 So far as we can determine from the printed page no just criticism can be made of counsel's offers to prove or of his arguments in support thereof; and we accept the action of the trial

judge in denying a new trial as proof that there was no impropriety in the manner in which the offers were presented.

The judgment is affirmed.

A true copy.

Teste:

____ ____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

116 And afterwards, on the same day, to-wit: On the third day of February, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, FEBRUARY 3, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1520.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the fourth day of March, 1909, in the October Term last aforesaid, there was filed a certain Petition for Rehearing.

And afterwards, to-wit: On the eighteenth day of March, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

117 THURSDAY, *March* 18, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge, presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1520.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the Petition for Rehearing in this cause be, and the same is hereby overruled.

And afterwards, to-wit: On the thirtieth day of March, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, a Petition for Writ of Error, which is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM R. KING, Defendant in Error.

Petition for Writ of Error.

Your petitioner, Chicago Junction Railway Company, plaintiff in error in the above entitled cause, respectfully shows that
118 the above entitled cause is now pending in the United States Circuit Court of Appeals for the Seventh Circuit, and that a judgment has therein been rendered on the 3rd day of February, 1909, affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division; that a petition for rehearing in said cause was overruled on the 18th day of March, 1909; that the matter in controversy in said suit exceeds $1,000 besides costs, to-wit, the sum of $9,000; and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor

the revenue laws, nor the criminal laws and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon a writ of error.

Therefore, your petitioner, Chicago Junction Railway Company would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JOHN BARTON PAYNE,
SILAS H. STRAWN,
RALPH M. SHAW,
JOHN D. BLACK,
BLACKBURN ESTERLINE,
Attorneys for Chicago Junction Railway Company, Petitioner and Plaintiff in Error.

119 The foregoing petition is granted and a writ of error allowed as prayed for upon plaintiff in error giving bond according to the law in the sum of $15,000.

FRANCIS E. BAKER,
Circuit Judge.

Endorsed: Filed Mar. 30, 1909. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the thirtieth day of March, 1909, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *March* 30, 1909.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge.

1520.

CHICAGO JUNCTION RAILWAY COMPANY
vs.
WILLIAM R. KING.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the writ of error in the above entitled cause be, and the same is hereby allowed.

120 And afterwards, on the same day, to-wit: On the thirtieth day of March, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, a certain Assignment of Errors, which is in the words and figures following, to-wit:

121 United States Circuit Court of Appeals for the Seventh Circuit.

No. 1520.

CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM R. KING, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error, Chicago Junction Railway Company, by its attorneys, and in connection with its petition for writ of error, says, that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

I. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois for $9,000., and costs of suit, entered on the 23rd day of June, A. D. 1908, in favor of said defendant in error and against said plaintiff in error.

II. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

III. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the said Circuit Court overruling the motion of the plaintiff in error made when the defendant in error
122 rested his case, to dismiss the second and third counts of the declaration on the ground that the Act of Congress of the United States entitled "An Act to Promote the Safety of Employés and Travellers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893, amended April 1, 1896, and the Act of Congress of the United States entitled "An Act to Amend an Act Entitled 'An Act to Promote the Safety of Employés and Travellers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes,' approved March 2, 1893, and amended April 1, 1896," known as the Safety Appliance Acts, insofar as they seek to prescribe and regulate the equipment of freight cars, are in violation of the Constitution of the United States and unconstitutional and void, because

to prescribe and regulate the equipment of freight cars, as prescribed by said acts, is not a regulation of commerce among the several States.

IV. Said Circuit Court of Appeals erred in holding that the Safety Appliance Acts are a valid regulation of commerce among the several States and constitutional.

V. Said Circuit Court of Appeals erred in holding that the Safety Appliance Acts applied to the car and car movement disclosed by the evidence in the record.

VI. Said Circuit Court of Appeals erred in holding that defendant in error, when doing the work of repairing the coupler of the car, was within the protection of the said Safety Appliance Acts.

VII. Said Circuit Court of Appeals erred in holding that
123 defendant in error was not guilty of contributory negligence, as a matter of law, on the undisputed facts.

VIII. Said Circuit Court of Appeals erred in holding that the injury to the defendant in error, was not caused, or contributed to by the negligence of fellow-servants, and therefore, no recovery could be had.

IX. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in admitting evidence offered by the defendant in error on the fact as to whether or not the crew in charge of the engine were accustomed to carrying knuckles on the engine, on the ground that there was no charge in the declaration of any such custom, that the evidence offered of such custom was not material, and that the plaintiff in error was taken by surprise by such evidence.

X. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in admitting evidence offered by the defendant in error on the custom of blowing the whistle preceding train and engine movements, and the custom for the engineer to blow the whistle when he made every movement, and whether or not the bell was rung before this car moved; and what the custom was, if there was a custom, among the switchmen of that road and that crew, as to what they do when they discover a knuckle broken. On the ground that there was no allegation or charge in the declaration, on which the defendant in error relied, of any custom of blowing the whistle or ringing the bell or replacing broken knuckles.

XI. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in admitting evidence offered by the defendant in error to the effect that he and his wife were conducting a grocery and notion store at 26th and Halsted Streets, Chicago; that he had not earned anything in the con-
124 duct of said store above his expenses; that there had been no net earnings or profits in the conduct of said store and that he had drawn money out of the bank and put into said store to conduct it; that the value of the stock in the store was worth $700 in April 1908; that it was worth $400 in August, 1907; that in August, 1907, he put $400 in the business, and since August, 1907, he had put $300 in cash in the business; that he had drawn $50 a

month from the bank for every month since August, 1907, being a fund from the Trainmen's Association, and put it into the store, and that the said $50 a month was money which had not been earned in the store; that the money he drew from the bank and put in the business is represented by increased stock; that he drew from the business for the support of himself and wife between $35 and $40 per month. Because the evidence so admitted was not material to this cause, and was not proper evidence for the jury to consider in estimating damages.

XII. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in admitting evidence on the cross-examination of witness Corrigan, when said witness was asked if he recalled, during the time the defendant in error was switching in the yards of the plaintiff in error, of any other occasion when the crew shoved a train that had a knuckle broken down into the yards from the point where the accident happened; and whether or not the train could be pushed down with a knuckle broken or without a coupler of any kind. On the ground that it was immaterial whether they had on any other occasion shoved such a train down into the yards, and that it was immaterial whether or not they could push the train down with a broken knuckle or without any coupler.

XIII. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in permitting
125 the defendant in error to show upon the cross-examination of the witness E. J. Constant that there was a skeleton knuckle that could be used temporarily in the place of any knuckles broken on a car, on the ground that the defendant in error had already stated that there was such a knuckle but that it was not customary to carry it on engines and that he knew there was not one on this engine.

XIV. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the Circuit Court in refusing to allow the plaintiff in error to prove, after the defendant in error had testified to the custom to invariably make repairs at the point where the break was discovered, that there was no such custom, it being intended by such proof to meet the flat testimony of the defendant in error in that behalf.

XV. Said Circuit Court of Appeals erred in holding that the plaintiff in error was not prejudiced by the following language of counsel for defendant in error, spoken in the presence and hearing of the jury, in his argument on the admissibility of evidence of the fact of whether or not the crew were accustomed to carry knuckles on the engine, viz: "Mr. Corrigan ought to have gone and got the knuckle there too, it seems to me, and they carried these things and that is what it is for; it is a part of this case, this whole situation, that, when he found it was missing he knew they carried them there and he went back there after it." And that plaintiff in error was prejudiced by the following language used by counsel for defendant in error in the presence and hearing of the jury, in his argument on the admissibility of evidence of the custom of blowing the whistle,

viz: "They do not blow the whistle when there is no reason to apprehend someone is between the cars. This is with a view of showing the engineer did apprehend that. I understand it is not the rule to blow the whistle whenever the engine starts up. It is just a
126 custom of railroading. Ordinarily they do not blow any whistle, but if there is reasonable apprehension that a man may be in there, they also toot the whistle. That is my understanding. That is why I want to show your honor."

Because the language so used by counsel was such as to impress the jury with the facts therein claimed, which were not proved and did not exist in the case.

XVI. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and in refusing to sustain the Twelfth Assignment of Error of plaintiff in error, which was as follows:

"The court erred in not instructing the jury, upon request of counsel for the defendant, that in connection with the question of liability the amount of damages suffered by the plaintiff is not to be considered unless and until the jury determines that *that* the defendant is liable to the plaintiff, that the question of liability must first be determined before the amount of the damages may be considered."

XVII. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court and in refusing to sustain the Thirteenth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in instructing the jury as follows, viz:

"In passing upon the question as to whether the plaintiff should or should not have anticipated that the cars were or might be brought together while he was adjusting the coupler, he had the right to assume, in the absence of express or implied notice to the contrary, that the engineer and conductor would act with due care in the performance of their respective duties, and he was not guilty of negligence in not anticipating that either the conductor or engineer would be guilty of negligence, but, on the contrary, in the absence of such notice he had the right to act upon the presumption that they, and each of them, would exercise ordinary care in the performance of their respective duties.

"Because it is immaterial if the injury in fact resulted solely from the engineer's negligent act; that the presumption was immaterial if the engineer and the plaintiff were fellow servants."

127 XVIII. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Fourteenth Assignment of Error of plaintiff in error, which was as follows:

"The court erred in instructing the jury as follows, viz: Now, when Corrigan discovered that the coupler was in such defective condition that it was necessary for a switchman to go between the ends of the cars to replace the knuckle, in order that the cars might be coupled,—that it was necessary for a switchman or other person to go between the ends of the cars to replace the knuckle in order that the cars might be coupled,—it was his duty not to haul or use the

car while the coupler was in that condition, unless there was a necessity for so doing, and if it was reasonably practicable in the prosecution of the defendant's business for him to have repaired the coupler or have it repaired where the car stood, it was his duty to do so; and the mere fact that it was more convenient for him to repair the knuckle at the place where the evidence shows he intended to repair it, did not justify him in unnecessarily removing the car in its then condition to that place.

"Because it does not correctly state, but understates, the legal right which the defendant had to move the car to make the repairs; and the instruction should have been modified, as requested by the defendant, to the effect that if it was a proper railroading proposition that the car could be repaired sufficiently by the movement to where supplies were kept, that if that was a reasonable thing to do, the defendant had the right to make that movement to the place where the supplies were kept."

XIX. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Fifteenth Assignment of Error, of plaintiff in error; which was as follows:

"The court erred in giving the following instruction to the jury and in refusing to modify the same, viz:

"If his (the plaintiff's) injury was the result of the defendant's failure to obey this law of Congress and also the negligence of a fellow servant of the plaintiff, the plaintiff is entitled to recover in this case.

"Because the instruction to the effect that if the injury was the result of the defendant's failure to obey the Act of Congress and also the negligence of a fellow servant, was not, and is not, a correct statement of the law, and such statement of the law is erroneous and prejudicial to the defendant."

128 XX. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Sixteenth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in giving the following instruction to the jury, viz:

"On the evidence in this case the court charges you that Corrigan who has testified here as a witness, was not a fellow-servant of this plaintiff in respect to the question of determining whether or not the car with the defective coupler should be repaired or not before it was removed.

"Because the court abused its discretion in thus commenting upon the facts in the case prejudicial to the defendant, and because the said instruction does not contain a correct statement of the facts and law of the case, it appearing from the evidence that whatever the position of Corrigan as yardmaster may have been, there was nothing under the evidence to show that his position as yardmaster had anything to do with the accident; that he was acting at the time as a member of the switching crew and the engine was the only engine in that territory, and there was nothing to be considered but the movement of this particular train."

XXI. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Seventeenth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

"The plaintiff and the men working with him in the train crew, including the conductor and the engineer, were fellow servants working together in the operation of the train in question. If you believe from the evidence that the plaintiff was injured because of any negligent act of the engineer, or of the conductor, and that this negligent act was the sole moving cause of the injury, the plaintiff cannot recover, because in law when he entered the employment of the defendant he assumed the risk of negligent acts of his fellow employés.

"Because according to the evidence and the law the plaintiff was a fellow servant with the conductor and engineer in the operation of the train."

XXII. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Eighteenth Assignment of Error, of plaintiff in error, which was as follows:

129 "The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

"If you believe from the evidence in this case that the defendant, the Chicago Junction Railway Company, used proper and reasonable care in inspecting the train in question for defective appliances, and such reasonable inspection failed to disclose the fact that there was any broken knuckle at the point in question, and that the first knowledge that the Chicago Junction Railway Company had that there was a broken knuckle was when conductor Corrigan saw the knuckle a short time before the accident; and if you believe that the movement of the train from the point where it stood at the moment the broken knuckle was discovered, south towards the point where a supply of knuckles was kept, was a reasonable proper and careful movement to make under the circumstances then known to conductor Corrigan, then you are instructed that the Chicago Junction Railway Company was guilty of no negligence in attempting, by and through the orders of its conductor, to move the train to the point south, near which extra knuckles were kept on hand and where repairs could be made to the coupler.

"If you find under the facts stated in the foregoing paragraph, that the movement to the south was a reasonably careful one, then you are instructed that even though you may believe that the conductor or engineer was negligent in the manner in which he moved the train, still the plaintiff cannot recover, because such negligence was that of his fellow-servants.

"Because the said instruction states correctly the degree of care for which the defendant was liable to the plaintiff and the facts and circumstances upon which such degree of care must be based; and because further the plaintiff and the conductor and engineer were fellow-servants."

XXIII. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Nineteenth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

"If you do not find the defendant was guilty of negligence which makes it liable to the plaintiff in this suit, or if you find that the plaintiff's conduct was so careless or negligent that he cannot recover, you will have no occasion to consider the question of the plaintiff's damages or whether he is entitled to compensation at all. If under the instructions of the court and the evidence, you find that the defendant exercised proper care under the circumstances, and that the plaintiff was guilty of negligence, then you should return a verdict of not guilty in favor of the defendant."

130 XXIV. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Twentieth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

"The Safety Appliance Act so-called requires railroad companies to equip their cars with safety couplers such as can be operated without the necessity of a man going between the ends of the cars, and to maintain these couplers in proper condition for operation. This law does not, however, make a railroad company an absolute insurer of the safety of the couplers at all times, but only requires that the company shall use proper care and diligence to keep the couplers in repair after having put them upon the cars. If you believe from the evidence in this case that the Chicago Junction Railway Company used proper care after learning of the defective condition of the coupler toward putting it in good order, and that the movement of the train south toward the point where the supply of extra knuckles was kept, was under the circumstances a reasonably careful thing to do, then you should find the defendant not guilty. The law does not require a railroad company to make repairs upon couplers or cars immediately upon discovering that a defect exists or that a break has occurred, unless the safety of the men handling the train requires imperatively that this should be done. If you believe from the evidence in this case that the train could have been moved south toward the point where the extra supply of knuckles was kept with a proper regard for the safety of the members of the crew and it was not the fact of the attempt to move the train, but the attempt of the plaintiff to repair the coupler himself without giving notice of his intention to the other members of the train crew, or at least without giving them notice in such manner as to call their attention to the place where he was going and the work he was intending to do, which caused the accident, then you should find the defendant not guilty.

"Because the said instruction sets forth the duties imposed upon the said defendant by the Safety Appliance Acts in the manage-

ment of trains, and the relation of the railroad company to its employés under said Acts."

XXV. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Twenty-first Assignment or Error, of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

131 "In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's railroad, without setting a signal of some sort to give warning to train crews not to move engines or trains in to where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circumstances shown by the evidence would not have gone between the cars, then the plaintiff cannot recover."

XXVI. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of defendant in error for costs of suit in the Circuit Court of Appeals.

Wherefore, said Chicago Junction Railway Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the Circuit Court of the United States for the Northern District of Illinois, with instructions to grant a new trial in said cause, or for such other proceedings in said cause as may be determined upon by this Honorable Court; to the end that justice may be done in the premises.

JOHN BARTON PAYNE,
SILAS H. STRAWN,
RALPH M. SHAW,
JOHN D. BLACK,
BLACKBURN ESTERLINE,
Attorneys for Plaintiff in Error.

Endorsed: Filed Mar. 30, 1909. Edward M. Holloway, Clerk.

132 And afterwards, to-wit: On the thirtieth day of March, 1909, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, a certain Bond on Writ of Error to the Supreme Court of the United States, which Bond is in the words and figures following, to-wit:

Know all men by these presents, That we, Chicago Junction Railway Company, a corporation, as principal, and John A. Spoor, and R. Fitzgerald, as sureties, are held and firmly bound unto William R. King, in the full and just sum of fifteen thousand dollars ($15,000), to be paid to the said William R. King, his certain attorney,

executors, administrators, or assigns; to which payment, well and truly to be made, the said Chicago Junction Railway Company binds itself, its successors and assigns, and we the said John A. Spoor and R. Fitzgerald, bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of March, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Circuit Court of Appeals for the Seventh Circuit in a suit depending in said Court, between Chicago Junction Railway Company, plaintiff in error, and William R. King, defendant in error, a judgment was rendered against the said Chicago Junction Railway Company, plaintiff in error, (said suit having been taken by the Chicago Junction Railway Company, as plaintiff in error by writ of error from the Circuit Court of the United States for the Northern District of Illinois to the United States Circuit Court of Appeals for the Seventh Circuit), and the said Chicago Junction Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the
133 judgment in the aforesaid suit, and a citation directed to the said William R. King, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Chicago Junction Railway Company shall prosecute said writ of error to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHICAGO JUNCTION RAILWAY COMPANY,

[SEAL.] By J. A. SPOOR, *President.*

Attest:

H. E. PORONTO, *Secretary.*

JOHN A. SPOOR. [SEAL.]
R. FITZGERALD. [SEAL.]

Signed, Sealed and Delivered in the Presence of
H. E. PORONTO.
BLACKBURN ESTERLINE.

Approved by
FRANCIS E. BAKER,
Circuit Judge.

STATE OF ILLINOIS,
County of Cook, ss:

We, John A. Spoor and R. Fitzgerald, whose names are subscribed as sureties to the foregoing bond, state under oath, that we are worth the sum of fifteen thousand dollars ($15,000) in property subject to execution, over and above all our just debts and liabilities.

JOHN A. SPOOR.
R. FITZGERALD.

Subscribed and sworn to before me this 30th day of March, A. D. 1909.

F. L. HARMAN,
Notary Public, Cook County, Illinois.

Endorsed: Filed Mar. 30, 1909. Edward M. Holloway, Clerk.

134 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 133, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and the Petition for Rehearing) in the case of Chicago Junction Railway Company vs. William R. King, No. 1520, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of April, A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

135 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Chicago Junction Railway Company, plaintiff in error and William R. King, defendant in error, a manifest error hath happened, to the great damage of the said Chicago Junction Railway Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of

right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of March, in the year of our Lord one thousand nine hundred and nine.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by

FRANCIS E. BAKER,
Circuit Judge.

136 UNITED STATES OF AMERICA,
Seventh Judicial Circuit, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this first day of April, A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Copy deposited for the defendant in error in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] Filed Mar. 30, 1909. Edward M. Holloway, Clerk.

137 UNITED STATES OF AMERICA, *ss:*

To William R. King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein Chicago Junction Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of March, in the year of our Lord one thousand nine hundred and nine.

FRANCIS E. BAKER,
Circuit Judge.

Service of the within citation is hereby accepted by William R. King, defendant in error, this 31st day of March, 1909.

WILLIAM R. KING,
By JAMES C. McSHANE,
His Attorney.

138 [Endorsed:] Filed Mar. 31, 1909. Edward M. Holloway, Clerk.

Endorsed on cover: File No. 21,603. U. S. Circuit Court Appeals, 7th Circuit. Term No. 195. Chicago Junction Railway Company, plaintiff in error, vs. William R. King. Filed April 16th, 1909. File No. 21,603.

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 34

CHICAGO JUNCTION RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM R. KING,
Defendant in Error.

In Error to the United States Circuit Court of Appeals
For the Seventh Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN BARTON PAYNE,
JOHN D. BLACK,
Counsel for Plaintiff in Error.

GUNTHORP – WARREN PRINTING CO., CHICAGO

upreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 34

CHICAGO JUNCTION RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM R. KING,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

1.

STATEMENT OF CASE.

This case was brought in the Superior Court of Cook County, Illinois, by defendant in error (King) against plaintiff in error (Chicago Junction Railway Company) to recover damages for personal injuries sustained by King while employed by the company as a switchman in its freight switching yards at Chicago.

The case was removed upon petition of the com-

pany to the United States Circuit Court in and for the Northern District of Illinois, Eastern Division, upon the ground that it was based upon the violation of certain federal laws and involved federal questions. It was tried in the said United States Circuit Court.

The case was submitted to the jury upon two counts of the declaration based upon the Act of Congress known as the Safety Appliance Act, approved March 2, 1893, 27 U. S. Stat. at Large, 531. The charge of the first of these counts was, that the company was possessed of and operating a certain railway line extending among other places through Chicago and was a common carrier engaged in moving interstate traffic upon and in connection with its line and employed King as a switchman to switch certain cars and engines; that the company negligently, unlawfully and contrary to the statutes of the United States in such case made and provided, hauled and used upon its railway line a certain car equipped with a certain automatic coupler which it was alleged was in such a defective, broken and inoperative condition of repair that it could not be coupled from the side of the car without the necessity of its switchmen going between the end of the car and the car to which it was to be coupled, as a result of which King was then and there required to go between the ends of said cars for the purpose of repairing and adjusting said defective and inoperative coupler so that the cars could be coupled together, and while he was so doing, in the exercise of ordinary care, as a direct re-

sult and in consequence of his being so required to be between the ends of the cars, he was injured.

The second count based on the Safety Appliance Act alleged that King was employed by the company in interstate commerce and was required by his duty as switchman to go between the ends of the cars to replace and adjust a portion of the automatic coupler so that the cars could be coupled together, and that the engineer knew, or in the exercise of ordinary care, would have known, that he was so between the ends of the cars and that it became the duty of the engineer not to move said cars together until he had given King by whistle signals, or otherwise, warning of his intention to move the cars; the disregard by the engineer of this duty, as a direct result of which King was injured.

To this declaration the company filed a plea of the general issue.

It was contended by the company upon the trial and upon the further proceedings in the Circuit Court of Appeals for the Seventh Circuit, that the Safety Appliance Act is unconstitutional and void and was beyond the power of Congress to enact under the commerce clause of the Constitution; and this contention, with others, will be submitted hereinafter.

It was, and is, further contended that the trial court committed error in his charge to the jury, and in refusing to give to the jury an instruction at the close of all the evidence to find the company not guilty, upon the ground that the uncontradicted evidence shows that King was

guilty of contributory negligence which caused his injuries and without which the accident would not have occurred. These contentions make necessary a statement of the evidence.

The Evidence.

Upon beginning the trial, it was stipulated between the parties (Trans., 17) that the company was, at the time of the accident, which occurred December 7, 1906, a common carrier by railroad and possessed of and operated a railroad extending from the City of Hammond, in the State of Indiana, into, around and about the Union Stock Yards, at the City of Chicago, in the State of Illinois; that the car in question, Armour Refrigerator Line 6189, was being used in interstate commerce and started from the Union Stock Yards at Chicago, Illinois, with a load; had gone to various points outside of the State of Illinois, and at the time of the accident, was returning home empty; that it was delivered to the company upon the return trip by the Illinois Central Railroad Company at about 1:20 A. M. December 6, 1906, and up to that time showed no signs of being in bad order as to its draft timbers or running appliances in any way.

During the progress of the trial, it was further stipulated (Trans., 35) that at the point of delivery, about three-quarters of a mile distant from the point of the accident, a car inspector of the company inspected the car at about 4 o'clock in the morning of December 6, and examined the couplings to see if they were in proper order and discovered no defect; that a num-

ber taker of the company took a car record of a train in which this car was moving at 9 o'clock in the morning of December 7, the day of the accident, and that the train showed no break or opening at any point at that time. Boland, a conductor for the company, testified without contradiction that he was in charge of the engine which moved the train containing this car to the track upon which it stood at the time of the accident; that he had no report, record or recollection of discovering a broken coupler on the train, and that in the regular course of business, if a break had been discovered, a report would have been made of it by him.

These facts show that the coupler was apparently in good condition within one hour before the accident.

William R. King, was thirty-six years of age and had been in the railroad business for eight years in the capacities of car inspector, car repairer (which position he held four years) and switchman. He had been employed by the railway company for a year and a half as switchman in the Union Stock Yards district in the City of Chicago (Trans., 18); he had worked for three months prior to the accident with the same engine crew consisting of engineer, fireman, conductor, rear switchman and head switchman (Trans., 26); he was the head switchman and it was his duty to follow the engine. (Trans., 18.)

In the Union Stock Yards there were several different sets of tracks known by different names and each of which constituted a different switching division. King had worked at different times on all of these tracks but for about three months prior to the

accident had switched up and down the "Packingtown" tracks which consisted of two tracks called the "east and west main tracks" (running generally north and south from 40th street to 47th street), and platform tracks and sidetracks running at short intervals in both directions from these main tracks into different industries and switching yards. About three times a day during this time King's crew went with the engine to the north end of the Packingtown west main track for cars and shoved them south and distributed them over these different sidetracks. The movement of the great bulk of this business was toward the south. The engine usually worked from the north end of the train, upon the west main track, but occasionally when that track was blocked would go over onto the east main track to do the same work. The business was purely a switching business. (Trans., 26-27.)

The accident occurred between nine and ten o'clock in the morning. A train consisting of fourteen or fifteen freight cars, including car No. 6189 of the Armour Refrigerator Line, was that morning standing on the curved north end of the Packingtown west main track for about an hour before nine o'clock. (Trans., 19.) The south car was several car lengths north of an east and west street crossing known as "Exchange avenue." The engine with which King was working came from the south on the east main track, without cars attached, and at about the north end of the cars standing on the west main track followed the curve in the track to the northwest to a switch clear around the curve, and then came back east and south through the switch onto the west main

track where King made a coupling of the engine with the north end of the standing train. (Trans., 28.) The conductor, Corrigan, had gotten off the engine at Exchange avenue to walk north along the east side of the standing cars to take their numbers and learn where they were to be switched. The rear brakeman, Shaw, stayed with the engine until about the time King made the coupling to the engine. (Trans., 20-49.) One, or both, of the switchmen gave a signal to the engineer to go back north, which was done, and Shaw then discovered that the train was cut in two, six cars from the engine. He thought conductor Corrigan had made the cut there as the fifth and sixth cars from the engine were for delivery to Nelson Morris & Company at a point northeast of where the train was standing. (Trans., 49.) The six cars were pulled back northwest around the curve and then shoved east into the Nelson Morris & Company track where the fifth and sixth cars were cut off and the engine with the four remaining cars attached went back again to the switch and shoved the four cars in again on the west main Packingtown track. Shaw rode on top of the fourth car from the engine and King stood on top of the car next to the engine. (Trans., 20.) As the four cars approached the standing train Shaw gave a signal to stop, and just before the cars came in contact saw, for the first time, that the knuckle in the coupler upon the north end of the north car of the standing train was broken. This was Armour Refrigerator Line car 6189.

Up to that time Shaw had no knowledge that the

coupler was broken. (Trans., 49.) Conductor Corrigan also did not learn of the broken knuckle until that time. The conductor was then standing on the ground at a point near the opening between the cars in the standing train and the cars attached to the engine. (Trans., 39.) Corrigan and Shaw examined the broken knuckle and found that it was a new break (Trans., 41-50) at the point where the knuckle fitted into the lock which held the knuckle shut after the cars were coupled. The front part or head of the knuckle was in the same condition as though there had been no break and there was nothing about the character of the break to prevent the car from being shoved further south. (Trans., 41-50.) The coupler and knuckle were of the type known as the "Improved Gould Coupler." (Trans., 40.)

Corrigan decided to shove the car south to a repair shop belonging to Armour & Company known as the "Old Lipton House," which was about three blocks south of the point where these cars stood and where a supply of knuckles of this type was kept, in order to get a knuckle to fit into the coupler. (Trans., 40.) He walked south along the tracks to line up the switches for this movement (Trans., 40), and Shaw went to the south end of the train and got up onto it so as to signal the engineer when the switches had been set. (Trans., 49.)

A short distance south of Exchange avenue, Corrigan met a car inspector for Armour & Company, one Tony Tozinski, and told Tony there was a broken knuckle on an Armour Refrigerator car and that they were going to shove the train down; and asked Tony

to get a good knuckle to replace it. Tony said that he would get it. (Trans., 40-54.) He went to the car, looked at the coupler, found that it was a new Gould coupler with a fresh break across the tongue and went back to his repair shanty and got another knuckle. (Trans., 54.)

King did not at this time know of the broken knuckle. From the top of the car next to the engine he saw Corrigan and Shaw talking, but did not know what they were doing, and remained on the car until he saw Corrigan walk down towards Exchange avenue to throw the switches. He knew that throwing the switches in this manner was the regular thing preparatory to switching south. He also saw Shaw walk down towards Exchange avenue. King then walked down to where he had seen Corrigan and Shaw talking, and saw the opening between the cars and the broken knuckle. He saw that it was a Gould Improved Knuckle and remembered that there was a knuckle of this description lying on the front end of the engine, which he had himself picked up along side the track and placed there a short time before. (Trans., 30.) Neither Corrigan nor Shaw knew that this knuckle was on the engine, and Corrigan did not know of any knuckle of that type nearer than the Lipton repair yard. (Trans., 51-40.) There are ninety-seven different catalogued varieties of knuckles, which are not interchangeable, and will not work properly in any coupler except those of which they are especially designed as a part, and they are of varying weights. The weight of the knuckle of the Gould Improved Coupler is fifty-one pounds.

(Trans., 47-48.) It was not the custom of the railway company to carry a variety of these knuckles for repair purposes upon the front end of engines. (Trans., 40-50.) The space on the front of the engine was four to five feet across and two to three feet wide (Trans., 33) and was so small it could not possibly hold a full assortment of these knuckles.

The train at this time stood on the curve in the track and King walked up the west side of the train toward the engine for the purpose of getting the knuckle which he had placed there. On the next track west, parallel to the track upon which his train stood, a train of loaded coal cars was standing, and these cars also extended around the curve to the northwest. The space between the two trains was not more than three or four feet. (Trans., 21-28.) The west train was so close to the train to which the engine was attached that the switchmen, because of the coal cars and the curve in the track, could not see the engine from the point where the broken knuckle was; nor could the engineer see the point where the knuckle was located.

When King reached the engine he had no talk with anybody; the engine pump was working and making a noise and there was a stock train pulling out which made quite a noise. He took the knuckle off the end of the engine nearest to the cars and walked back through the space up which he had just come. (Trans., 30.) When taking the knuckle off the engine he states he held his left hand up and waved it and that the engineer looked at him as he made this motion. (Trans., 21.)

Upon reaching the point where the break was, King took out the pin which held the old knuckle in place, removed the knuckle and put the new one in position for the pin and while reaching for the pin to make the new knuckle fast the car north of him was shoved south by the engine and his hand was caught. At almost the same time he was caught, he heard a blast of the engine whistle. (Trans., 22.)

Neither the conductor, the rear brakeman, the engineer nor the fireman saw King at any time while he was attempting to replace the broken knuckle, nor knew of the attempt, and he did not tell any of them of his intention to make the replacement. The conductor, the rear brakeman and the fireman testified at the trial. (Trans., 37-39-48.) The engineer died some months before the trial. (Trans., 39.) The signal for the movement of the train which resulted in the injury to King was given by conductor Corrigan after he had lined up the switches in the yard, to the rear brakeman, Shaw, who transmitted it to the engineer. (Trans., 34.) The fireman testified that two whistles were blown by the engineer before the engine started to move (Trans., 38), and King (Trans., 22) and a track laborer, Patrick Shaw (Trans., 54), testified that they heard the whistle signals at about the same time that the train started to move.

When the accident occurred King cried out, and switchman Shaw hearing the shout gave a signal to the engineer to stop the train, which moved only ten to twenty feet. (Trans., 50.)

Further Proceedings.

The trial resulted in a verdict of the jury, finding the company guilty and assessing the damages of King at the sum of nine thousand dollars ($9,000), upon which judgment was entered and the company prosecuted in the Circuit Court of Appeals for the Seventh Circuit, its writ of error, as a result of which proceeding, the judgment of the trial court was affirmed; and the company has taken out its further writ of error upon which the cause is brought to this court.

2.

SPECIFICATION OF ERRORS RELIED UPON.

The errors specifically relied upon by plaintiff in error, are the following:

I. The Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois for $9,000 and costs of suit, entered on the 23rd day of June, A. D. 1908, in favor of said defendant in error and against said plaintiff in error.

II. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said Circuit Court for a new trial.

III. Said Circuit Court of Appeals erred in affirming and in not reversing the ruling of the said Circuit Court overruling the motion of the plaintiff in error made when the defendant in error rested his case, to dismiss the second and third counts of the declaration on the ground that the Act of Congress of the United States entitled "An Act to Promote the Safety of Employes and Travellers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes," approved March 2, 1893, amended April 1, 1896, and the Act of Congress of the United States entitled "An Act to Amend an

Act Entitled 'An Act to Promote the Safety of Employes and Travellers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes,' approved March 2, 1893, and amended April 1, 1896," known as the Safety Appliance Acts, insofar as they seek to prescribe and regulate the equipment of freight cars, are in violation of the Constitution of the United States and unconstitutional and void, because to prescribe and regulate the equipment of freight cars, as prescribed by said acts, is not a regulation of commerce among the several states.

IV. Said Circuit Court of Appeals erred in holding that the Safety Appliance Acts are a valid regulation of commerce among the several states and constitutional.

VI. Said Circuit Court of Appeals erred in holding that defendant in error, when doing the work of repairing the coupler of the car, was within the protection of the said Safety Appliance Acts.

VII. Said Circuit Court of Appeals erred in holding that defendant in error was not guilty of contributory negligence, as a matter of law, on the undisputed facts.

VIII. Said Circuit Court of Appeals erred in holding that the injury to the defendant in error, was not caused, or contributed to by the negligence of fellow-servants, and therefore, no recovery could be had.

XVII. Said Circuit Court of Appeals erred in af-

firming the judgment of the Circuit Court and in refusing to sustain the Thirteenth Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in instructing the jury as follows, viz:

In passing upon the question as to whether the plaintiff should or should not have anticipated that the cars were or might be brought together while he was adjusting the coupler, he had the right to assume, in the absence of express or implied notice to the contrary, that the engineer and conductor would act with due care in the performance of their respective duties, and he was not guilty of negligence in not anticipating that either the conductor or engineer would be guilty of negligence, but, on the contrary, in the absence of such notice he had the right to act upon the presumption that they, and each of them, would exercise ordinary care in the performance of their respective duties.

Because it is immaterial if the injury in fact resulted solely from the engineer's negligent act; that the presumption was immaterial if the engineer and the plaintiff were fellow-servants."

XIX. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Fifteenth Assignment of Error, of plaintiff in error; which was as follows:

"The court erred in giving the following instruction to the jury and in refusing to modify the same, viz:

If his (the plaintiff's) injury was the result of the defendant's failure to obey this law of Congress and also the negligence of a fellow-servant of the plaintiff, the plaintiff is entitled to recover in this case.

Because the instruction to the effect that if the injury was the result of the defendant's

failure to obey the Act of Congress and also the negligence of a fellow-servant, was not, and is not, a correct statement of the law, and such statement of the law is erroneous and prejudicial to the defendant."

XXV. Said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in refusing to sustain the Twenty-first Assignment of Error, of plaintiff in error, which was as follows:

"The court erred in refusing to give to the jury the following instruction requested by the defendant, viz:

In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's railroad, without setting a signal of some sort to give warning to train crews not to move engines or trains in to where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circumstances shown by the evidence would not have gone between the cars, then the plaintiff cannot recover."

3.

BRIEF OF ARGUMENT.

(A)

While cases arising under the Safety Appliance Acts, have more than once been presented here, we find no decision by this court determining the constitutionality of the acts. Other questions arising under them have been submitted and have been passed upon; but the court has not declared the Acts to be good or bad.

In *Boyd* v. *Alabama*, 94 U. S., 645, the court said:

> "Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court, upon the constitutionality of the acts, because that point might have been raised and determined in the first instance."

If the Safety Appliance Acts be valid, it must, of course, be for the reason that they are regulations of commerce within the power granted the Congress by the Constitution "to regulate commerce with foreign nations, and among the several states."

If a law which prescribes only the style and mechanical operation of the coupling equipment upon a freight car is not a regulation of commerce, then the act upon which this judgment is based, is beyond the power of the Congress to enact, and the judgment should be reversed.

The portion of the Act here involved, Section 2, is as follows:

> "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such (interstate) common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This court has repeatedly declared that the power to regulate commerce includes the power to regulate the instrumentalities of commerce. It does not follow from these decisions that every statute which affects and attempts to control the physical construction of vehicles or other structures which may be used in connection with railroad business between the states, is necessarily a regulation of commerce, or that such vehicles or structures are instrumentalities of commerce. It is pointed out by Mr. Justice Field in *County of Mobile* v. *Kimball*, 102 U. S., 691, at page 702, that there is a distinction, which has not always been borne clearly in mind, between commerce, as strictly defined, and its local aids or instruments.

In *Railroad* v. *Maryland*, 88 U. S., 456, this court said, in discussing transportation by land, at page 470:

"This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to state regulation and control. They were all made either by the states or under their authority. The power of the state to impose or authorize such tolls, as it saw fit, was unquestioned. *No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation.*"

And we contend that this position is today unchanged. A regulation affecting the style of equipment of a freight car has, we submit, no bearing upon commerce between the states as defined by this court, and was not a subject within the contemplation of the framers of the Constitution.

By its title, that portion of the Safety Appliance Acts in force at the date of the occurrence which gives rise to this suit was "an act to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes." The "other purposes" were the requirement of other specific equipment; the imposition of a penalty for violations of the act, and the abolition of the defense of assumed risk in actions brought by employees for injuries resulting from failure to provide the required equipment. It is not recited in

the title that the act is for the regulation of commerce, but that its purpose is to promote the safety of employees and travelers. We submit that it is not within the reasonable scope of the language of the Constitution that these classes of persons shall be singled out for the especial protection of the Government. An attempted classification of the same character was held void in the *Employers' Liability Cases,* and in his dissenting opinion therein Mr. Justice Moody said, 207 U. S., at p. 529:

> "If the statute now before us is beyond the constitutional power of Congress, surely the Safety Appliance Act is also void, for there can be no distinction in principle between them."

And this view that the Act is not for the regulation of commerce, but solely to provide for the safety of employees and others, must be considered in determining whether the Act falls within the power granted by the Constitution. The distinction which is stated by Mr. Justice Field in *County of Mobile* v. *Kimball,* must be borne in mind, and the local aids or instruments of commerce regarded apart from the commerce itself. It is not difficult to point out the distinction or to cite examples clearly showing it.

Suppose the case of a railroad engaged purely in the handling of interstate business and maintaining upon its line a freight house or station in which none but interstate packages are stored and transferred. Is it within the power of Congress to provide that the company shall build such a station only of stone, and not of wood, and not above the height of one or two stories from the ground? We submit it is clear that such a law would not be, by

this court, regarded as a regulation of commerce among the States, and that it would not be enforced; and there is no valid distinction, we submit, between such a case and the requirement found in the section involved here, that freight cars must be equipped with appliances of a uniform character and action.

Suppose the Congress should provide that all wires upon which telegraph messages shall be transmitted between the States are to be of uniform size, or not larger than a given diameter, would such an Act be held a regulation of commerce?

Should the Congress, by statute, provide that a stage line, carrying passengers between two States, shall not use in its business white horses or black horses, but must use exclusively horses of a bay color, or horses more than fourteen hands high, we submit there could be found no connection between the commerce in which the owner of the stage line was engaged and the attempted regulation imposed by the statute.

It is matter of common knowledge that the conditions of freight transportation upon interstate railroads in different parts of the United States differ widely with the physical geography of the locality. We submit it is clearly not within the power of Congress, under the Constitution, to say that an interstate railroad, traversing mountainous country where engines of great power are required, shall use locomotive equipment uniform with that upon railroads operating only in flat country.

And we submit, as in the foregoing illustrations, the size, the color or the construction of the vehicles in which freight shall be transported from one state

to another, are matters not to be regulated by the Congress under the commerce clause. They are purely matters which concern "local aids" to commerce and are not commerce itself.

There is nothing, we submit, in the earlier decisions of this court that leads to any other conclusion, and we earnestly submit that the refusal of the lower courts to hold the Act unconstitutional, was error.

(B)

The court, following earlier cases, held in *Williamson* v. *U. S.*, 207 U. S., 425, at p. 432:

> "If there be a constitutional question adequate to the exercise of jurisdiction, the duty exists to review the whole case";

and in *Union Pacific Ry.* v. *Harris,* 158 U. S., 326, and *Northern Pacific Railroad* v. *Amato,* 144 U. S., 465, considered the whole record to determine whether the judgments entered should stand.

In the more recent case of *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Railway Company,* 220 U. S., 590, the evidence was considered to determine whether the plaintiff's intestate had been guilty of such contributory negligence as to defeat a recovery under the Safety Appliance Acts; and the conclusion was reached from an examination of the record and a review of the facts, that there could be no recovery because of the contributory negligence of the decedent.

This brings us to the submission of the contention that the trial court erred in refusing to direct a verdict for plaintiff in error, and that upon the whole

record the judgment and its affirmance, are erroneous.

It is apparent from a reading of the statement of facts that King went into an extremely dangerous position between the ends of two cars in a train which was about to be moved, and which he knew was about to be moved, without taking any steps to guard against the train movement, and without the exercise of any measure of care for his personal safety.

The facts have been necessarily presented in our foregoing statement of the case. They are, in part, that the broken knuckle was four cars distant from the engine (Trans., 20); that it was at a portion of the train which the engineer could not see, because of the curve in the track and of the coal cars which stood parallel to the train with which King's crew was working (Trans., 21-28); that the break in the knuckle was of such a character that it did not prevent shoving the car, though it would have prevented pulling it (Trans., 41-50); that the conductor had consequently decided to shove the car down to a repair yard three city blocks distant, and that King had seen the conductor start down to line up the switches for this movement and had seen the other switchman in position near the end of the train to give signals for the train movement as soon as the conductor had lined the switches (Trans., 30); and that King knew that the movements which the conductor and the other switchman were making were movements preparatory to shoving the train south. (Trans., 29.)

These facts appear without any suggestion of

contradiction. They present at once the query whether any sane man could, without giving notice of his intention so to do, step between two cars, which he knew were about to be moved together, for the purpose of making a repair upon one of them, and still be in the exercise of ordinary prudence.

In *Schlemmer* v. *B. R. & P. Ry.*, 220 U. S., 590, the court held that "there is nothing in the statute (the safety appliance act) absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not, for that reason, absolved from the duty of using ordinary care for his own protection *under the circumstances as they existed.*" The facts were, in many respects, similar to those at bar. Schlemmer was an experienced brakeman. He attempted to make a coupling between a shovel car which was not provided with an automatic coupler and a caboose in which there was an automatic coupler. He saw and knew that the shovel car was not equipped properly; he was not ordered to attempt to make the coupling, and he was told by the conductor before attempting to do so, that he must be careful to keep his head low so as not to be injured. The court held that his representative was not entitled to recover because the record showed "that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions made at the time, as to

the great danger of being injured if he raised his head in attempting to make the coupling in the manner in which he did." And upon this conclusion, it was decided that the action of the trial court in holding that the plaintiff could not recover because of Schlemmer's contributory negligence, and the action of the Supreme Court of Pennsylvania in affirming this judgment, were proper.

The decision, it seems to us, controls here. King, like Schlemmer, saw that the couplers were not in condition for the automatic operation required by the statute; he, like Schlemmer, knew that a train movement was about to be made; he, like Schlemmer, went without orders into a dangerous position and was injured. In the *Schlemmer case* there seems to have been a necessity for the making of the coupling; in the case at bar, there was no necessity for making a coupling or for changing the knuckle at the time and place chosen by King. In the *Schlemmer* case, the conductor and other members of the crew knew before the train movement that the switchman was going between the cars and into a dangerous place; in the case at bar, King went into the place of danger without the knowledge of the crew which was about to move the train, and without word or sign to indicate to any of them where he was going, or what he was about to do. King testified (Trans., 20), that after the conductor had gone south to line up the switches, he (King) discovered the broken knuckle and saw that it was one of the same kind he himself had placed on the front end of the engine; that he walked up the inside of the curve on the west

side of the cars (Trans., 21) between his own train and the parallel coal cars, and stepped onto the footboard of the engine, pulling the knuckle across to him, then reached up his left hand and waved it like that (indicating) and the engineer saw it and looked right at him. He took hold of the knuckle and held it up and motioned like that (indicating) and then went down to the opening with the knuckle.

The opinion of the Circuit Court of Appeals states (Trans., 86) that:

> "The engineer, on account of the curve in the track and the other cars, could not see the opening. But he saw plaintiff carry a knuckle back along his train. Plaintiff made certain signs to the engineer. Before judge and jury plaintiff reproduced the pantomime. This is not preserved in the bill of exceptions. Defendant, having the burden here, therefore fails to show that there was no evidence from which the jury might warrantably have found that plaintiff believed and had reason to believe that the engineer knew that plaintiff was about to replace a broken knuckle somewhere in the train and that it would be negligent, if not criminal, to move the train meanwhile. Under such circumstances plaintiff would have the right to assume, until he had some notice to the contrary, that the conductor would not order the train to be moved and that the engineer would not start the locomotive."

King testified (Trans., 29) that he saw the conductor and the other switchman in conversation (this before King knew of the broken knuckle) near the point where he afterwards discovered the break, and saw the conductor walk from this point down towards Exchange avenue.

"I walked out to the edge of the car so I could

see where he was going. Sometimes he would walk down there to line up switches and sometimes Shaw (the other switchman) would. One of them would always walk down south and line the switches up. That was the regular thing that he did."

He testified earlier (Trans., 27):

"During the three months that our engine worked up and down the Packingtown main tracks, it was our custom to come up from the south end of the Yards and to take cars which we found standing there on the west main Packingtown track, and shove them in south and to distribute them to different interests or to different railroad yards and different packing-house yards down in there. About three times a day we found cars at the north end of the Packingtown west main track, to be shoved in south and to be distributed in that way. Cars set in at the north end of the Packingtown main track were never to be taken off in any other direction except to the south though sometimes we would find a car there that we would have to switch out. The great bulk of business was toward the south."

We submit there is nothing in this testimony upon which to base the conclusion of the Circuit Court of Appeals that King under these circumstances had the right to assume, until he had some notice to the contrary, that the conductor would not order the train to be moved, and that the engineer would not start the locomotive.

King had seen the conductor walk down the track in the way he regularly did three times a day to line up the switches for the movement of the train to the south; and he had seen the other switchman take position at the rear end of the train from which to

repeat the conductor's signals to the engineer. He knew that the regular movement was toward the south, and that there was nothing about the character of the break in the knuckle to prevent the car from being shoved south. (Trans., 40, 41-50.)

Whatever may have been the meaning of the signals King gave to the engineer, it is clear the conductor did not see them; and even though they were such as to convey to the engineer full information of what King was about to do, they do not affect the ultimate question here, for the engineer was clearly King's fellow-servant, and if he negligently moved the train, knowing that King was in a position of danger, there is no liability upon the company for his act.

We urge, however, that there is nothing in the record to sustain the inference that King's pantomime gave information to the engineer of where he was going, how long he intended to remain, or what he intended to do.

The undisputed facts remain that King knew the train might be moved at any moment, knew that the switches were being set for the movement, and knew that its movement would be to the south. With this knowledge he stepped in between the south end of one car and the north end of another and attempted to do repair work,—and his injury resulted.

The Act was not intended to protect an employe unnecessarily and foolishly attempting, without taking precautions for his own protection, to make repairs on broken equipment while a train is in course of a switching operation.

The record shows, in our judgment, that both the trial court and the Circuit Court of Appeals misconceived the effect of the evidence showing King's contributory negligence. This is shown clearly in that portion of the opinion of the Circuit Court of Appeals, which states (Trans., 85):

> "The statute would be honored only in its breach if the same facts that would defeat the employe under the common law rule of assumed risk can be used to defeat him under the name of contributory negligence. *Schlemmer* v. *Buffalo, etc., R. Co.*, 205 U. S., 1. *So plaintiff's knowledge of the physical conditions cannot be charged against him in determining the quality of his conduct in going and being between the cars.*"

It would appear from this that the Circuit Court of Appeals, not only did not apprehend the effect of the first decision in the *Schlemmer case*, but in holding that King's knowledge of the physical conditions cannot be charged against him in determining the quality of his conduct, stated the flat converse of the rule established by this court on its second hearing of the *Schlemmer case*.

Whether the facts which show contributory negligence are the same as would have excused the company at common law, upon the ground that they show King had assumed the risk, makes no difference in their effect, if they do in fact show his contributory negligence; and to hold that the knowledge a man has is no factor in determining whether he has acted with ordinary prudence, is to state a proposition, we submit, that is not maintainable.

While our argument for reversal upon the merits

is based largely upon the proposition that the uncontradicted evidence shows King was guilty of contributory negligence, we desire to present these further matters.

The following instruction was refused (Trans., 61) (Assignment of Error, XXV):

> "In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's railroad without setting a signal of some sort to give warning to train crews not to move engines or trains into where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circumstances shown by the evidence, would not have gone between the cars, then the plaintiff cannot recover."

King had testified (Trans., 31):

> "I knew it was a rule of the company that repairs to cars could not be made on the main track without setting signals."

In the opinion of the Circuit Court of Appeals, it is stated (Trans., 86):

> "There was testimony that the rule (concerning setting of flags) was not applicable to situations like that disclosed in this case."

The court did not point out where such testimony was to be found in the record, and we respectfully submit there is none. The court proceeded further:

> "Besides, if the posting of flags, would not have further advised the engineer and conductor of their duty not to move the train, the jury presumably determined that the failure to post did not contribute to the injury."

This, we submit, is as much a misapprehension of the record and of the law, as was the ruling of the trial court in refusing the instruction complained of, for in addition to his testimony that he knew of the rule of the company forbidding repairs upon cars on the main track, unless a flag should be set, King testified (Trans., 32):

> "Whenever they set out a flag, that meant for the switching crew to be careful and not shove any car over that flag. There might be danger down at the other side of it."

So we contend there was full support in the record for the instruction requested, and that its refusal was prejudicial error.

There was, as well, error in giving to the jury the following instruction (Trans., 56) (Assignment of Error, XIX):

> "If his (the plaintiff's) injury was the result of the defendant's failure to obey this law of Congress and also the negligence of a fellow-servant of plaintiff, the plaintiff is entitled to recover in this case."

This, we submit, is an incorrect and prejudicial statement of the law. It is usually true that where the negligence of an employer concurs with the negligence of a fellow-servant in injury to an employe, the fact that the negligence of the fellow-servant contributed to the injury, does not constitute a defense.

In the case at bar, however, King's knowledge of the dangers to which he was exposed by the switching movement to the south without a proper knuckle in the coupler, cannot, as we have hereinbefore argued, be disregarded. And without regard

to whether the engineer knew or did not know that King was in a place of danger, or was or was not negligent, King knew the dangers and took a dangerous position. Assuming the engineer knew of King's intention to take this position, then it was his duty not to move the train until he knew King was out of danger, and if with such knowledge he did move the engine, this was a clear act of negligence on the part of a fellow-servant, entirely dissociated from the negligence of the company in failing to provide proper couplers, and was the sole moving cause of the injury.

The given instruction states a rule of law which is not applicable to the facts shown in this record, and it was prejudicial error to give it to the jury.

We desire, in conclusion, to respectfully submit to the court that our first proposition, viz.: that the Safety Appliance Acts are void, should dispose of this case without reference to the other considerations we have presented. But if this position be passed, we respectfully urge that the judgment should not be permitted to stand, because upon the whole record, it is contrary to the law.

JOHN BARTON PAYNE,
JOHN D. BLACK,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1911.

No. 34

CHICAGO JUNCTION RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM R. KING,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

JAMES C. McSHANE,
Attorney for Defendant in Error.

(21,603)

Geo. Hornstein Co., Printer, Chicago.

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(21,603)

The statement preceding the opinion of the Appellate Court in this case is so full and explicit as to obviate the necessity of a further statement upon our part. The Appellate Court's statement that King "saw Corrigan walk down *to throw the switches*" is misleading in so far as it assumes that King knew, or had reason to believe, that Corrigan walked down *to throw the switches*. The statement that King placed the knuckle on the engine "a short time before the accident" is also somewhat misleading, for, as a matter of fact, he placed it there the day before. We

shall answer counsel's argument under the following headings and in the following order: First. The act in question is constitutional. Second. Defendant in error was not guilty of contributory negligence. Third. There was no error in the portions of the court's charge to the jury complained of. We shall herein refer *to the original record pages and not to the "print" pages.*

I.

THE ACT IN QUESTION IS CONSTITUTIONAL.

The act involved is the Federal Safety Appliance Act of 1893, and *not* the Interpretative Act of 1903. This act has been in force for eighteen years, and has been enforced with great frequency by the District and Circuit Courts and the United States Circuit Courts of Appeals, and by the courts of last resort of the various states. It has also been enforced by this court on several occasions, and so far as we have been able to learn, has never been held unconstitutional by any court. Mr. Justice Moody, in his opinion rendered in the Employer's Liability cases, 207 U. S., 529, said that it has been enforced by this court "undisturbed by a doubt of its unconstitutionality." It is our understanding that there are several cases now under advisement by this court involving the constitutionality of the Interpretative Act of 1903 and of the Employer's Liability Act of 1908. In addition to this, this court has upon a number of occasions answered the contentions urged by counsel in this case. We did not receive Plaintiff in Error's brief until October 23, 1911, and we must forward

our brief by October 26, 1911, to reach Washington in time; hence in view of our other professional duties we have insufficient time in which to properly reply to counsel's argument upon this question. For the reasons above stated we will submit the question of the constitutionality of this act without argument.

There was one count based upon the violation of the State Safety Appliance Act (Rec., 7), which is substantially like the Federal Act, except that it is more favorable to the employe upon the question of contributory negligence. (*Luken* v. *L. S. & M. S. Ry. Co.*, 248 Ill., 377.) And if the Federal Act in question is unconstitutional, which we deny, the verdict under the facts of this case was warranted under the count based upon the State Act. (See *Luken* case, *supra.*)

II.

DEFENDANT IN ERROR WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

We think it at least doubtful whether this court has the right, or will feel called upon to pass upon this question; but we shall, nevertheless, discuss it on the theory that it will be decided. If the opinion of this court in *Schlemmer* v. *Ry. Co.*, 205 U. S., 1, which was followed by the Court of Appeals in this case be adhered to, then King's conduct *in going between the cars* cannot be considered in determining the question of contributory negligence; and as his conduct, *in going between the cars*, under the circumstances, is the only conduct complained of, he

cannot be held guilty of contributory negligence. Assuming, however, *as the trial court assumed in its charge to the jury in this case,* that King's entire conduct, and not merely his conduct while between the cars, should be considered in determining this question, we still think it clear that he cannot be held guilty of contributory negligence *as a matter of law.*

In *Ry. Co.* v. *Ives,* 144 U. S., 408, 12 Sup. Ct., 679, the lower court, in its charge, told the jury:

> "You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the Judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

And this court held this was the law, and affirmed the judgment. This court in that case also said:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the

conduct of the parties in that case was such as would be expected of reasonably, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court." See also *Jones* v. *Railroad Co.,* 128 U. S., 443.

The evidence shows that the coupling in question was one which it was King's duty to make. He was the head switchman, and it was his duty "to make all the head couplings at the head end of the train." (Rec., 21.) There were 12 cars in the train at the time of the accident (Rec., 25), and the coupling which he was attempting to make was between the fourth and fifth car from the north or head end of the train (Rec., 24), and hence, was "one of the head couplings at the head end of the train." In the natural order of events, it was necessary that this coupling should be made, and it was his place to make it, and it is not contended that he was told not to make it.

The evidence shows it was customary in the yards in question for the switchmen to replace broken knuckles, or make other light repairs, upon the cars where they stood at the time the defects were discovered. King testified:

"Q. What was the custom while you were working there, when a knuckle was found broken or light repairs necessary on these knuckles, as to whether the repairs were made where the

cars stood, when they were discovered out of repair, or was the car run to some place else in order to make them? A. *We made such repairs so that we could handle the train right where the car stood.* (Rec., 38.)

"Q. About making repairs, did they or did they not repair little things as this on this track whenever they found them out of repair on that track? A. Yes, sir.

"Q. Which was the fact, Mr. King, as to whether or not, during all the time that you were at work there they were or were not accustomed to replace a broken knuckle or make repairs of that kind on the track that this train stood on? A. Yes, sir." (Rec., 39.)

And again he said:

"Q. What was the cutsom if there was a custom among the switchmen on that road and that crew as to what they do when they discover a knuckle was broken? A. They would take a knuckle off the engine and put it in there so they could handle the train." (Rec., 27.)

Plaintiff in error's witness Boland, who was the conductor of the crew that had previously placed the train upon the track in question, testified:

"*It is usual for us to repair it if we can,* and if we cannot we let the repairers do it." (Rec., 45.)

Plaintiff in error's witness Shaw, one of the switchmen upon the train in question, testified:

"If any of the men found a coupler out of repair and we could make the repairs we made them. * * * If we are moving either way on these tracks with cars, and we should find a break and it was a handy thing for us to do, we might take a knuckle from a car on a siding and put in the place of it and afterwards put one in the place of the one we stole." (Rec., 69.)

As further showing that it was customary and practicable to replace such knuckles where they were discovered broken and that there was no necessity for moving this or other cars with broken knuckles, and that King had no reason to believe they would be so moved, King testified:

> "Q. What is the fact as to whether or not you were accustomed to carry those knuckles on the engine? A. We were accustomed to carry on the front end knuckles, links, pins and chains. I had worked with that engine three months and we carried them all the time." (Rec., 25.)

In this connecting counsel say that there was such a variety of knuckles that it was impracticable to carry extra knuckles on the engine. The evidence shows however that nearly all the cars handled by this crew were cars belonging to Armour, Swift and Morris, and that these couplers were nearly all the same kind. (Rec., 66.) It was clearly not impracticable to carry three different styles of knuckles. In addition there was a skeleton knuckle to be used in case of an emergency that would fit all couplers. (Rec., 37, 62.)

There was nothing in the character of the track, or its use, to indicate that it was improper, or impracticable, to replace a knuckle on that track as well as on any other track. In speaking of the track, the conductor said:

> "The track upon which the accident occurred was set aside as a delivery track, to deliver cars for our crew to take away." (Rec., 53.)

It appeared that trains were permitted to stand on this track "sometimes two or three hours. * * *

This train had been standing on that track a little over an hour." (Rec., 23.) On the question of this custom, the conductor testified:

> "Q. Do you recall, Mr. Corrigan, *during the time Mr. King was switching there,* of any other occasion when you shoved a train down into the yards from there that had a broken knuckle —now yes or no; do you recall any occasion? A. Not of that nature." (Rec., 54.)

And Shaw, the other switchman, testified:

> "Q. Do you remember of any particular occasion *during the time Mr. King was in your crew* when you shoved a train with a knuckle that was broken so it would not couple, shoved it from up north of Exchange avenue down south, do you remember of any instance when Mr. King was with you? A. I can't remember any particular instance." (Rec., 67.)

The foregoing evidence clearly warranted the jury in finding that it was customary for switchmen to replace broken knuckles as King was endeavoring to do at the time of the accident, and that there was nothing in the character, or use of the track, which would suggest to King that such custom should not be conformed to upon the occasion in question. The crew doubtless ran across cars with broken knuckles from time to time, yet the testimony of both the conductor and Shaw shows that they never knew of an occasion, during King's employment, when a train was thus shoved down in the yard to replace such a knuckle, and hence, there was no evidence that King knew, or had any occasion to suppose, that it was the conductor's intention to shove the train in question down in the yard,

instead of replacing the knuckle at the place of the accident.

In *Loubeck* v. *C. M. & St. P. Ry.*, 63 Wis., 92, in speaking of the force and effect of a custom, the court said (p. 92):

> "It was *a sort of common law of the company,* obligatory upon its employes, and as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them. It thus became a rule or custom of the company as well as an understanding between its employes. See also *Graham* v. *M. S. P. & S. S. Ry. Co.* (Minn.), 103 N. W., 714; 19 R. R. R., 232; *G. T. W. Ry. Co.* v. *Melrose* (Ind.), 78 N. E., 190; 20 Am. Neg. Rep., 523."

But it is claimed that King knew that conductor Corrigan had gone down to set the switches, and intended to back the train further down in the yards, while the knuckle was in its then condition. The evidence shows that King *did not know* that Corrigan had gone down to line up the switches, or that Shaw had gone down near the south end of the train in order to transmit a signal to the engineer, when he should receive such signal from Corrigan. Upon the contrary, the evidence shows that King had no reason to suppose that it was improper for him to replace the broken knuckle, or that the train would be started before it was replaced. King testified:

> "I stood on top of the car next to the engine and saw Shaw was on the fourth car from the engine, the last car, the south car. Then he came down there, and Mr. Corrigan, the conductor was there. As we shoved against them

the cars did not couple on and he gave me the signal to back away a little bit. I gave the signal to the engineer and he backed up and came ahead again. He backed away five or six feet. At that time I was standing on top of the car. They stood there and talked for a minute and then *Mr. Corrigan walked down to Exchange avenue* and Mr. Shaw jumped across the opening and walked one car-length, and then he got down onto a car of coal onto the east side of the train *and walked down to Exchange avenue south. Just as soon as they started,* I walked down to see what was wrong. I walked down there on top of the cars, and saw there was a knuckle broken there. The tongue had been broken off. I got down and looked at it and saw that I had one on the front end of the engine, just at the same time. *We carry knuckles,* chains, pins or links or anything like that on a kind of sheet iron or sheet steel covering the front end of the engine. (Rec., 24 and 25.) * * * Mr. Corrigan was about 60 feet south of this opening when I last saw him as I went down there. When I went down there and discovered this thing *he was at Exchange avenue. Exchange avenue was about three car-lengths from the south car of that train.* There were 12 cars in the train after we set out the two as I recollect, the whole train. I got off the west side of the car on the inside of the curve when I went down (up) for the knuckle." (Rec., 25.)

On cross examinati[illegible] in answer to the question as to was to whether he did not know that Corrigan had gone down to line up the switches he said:

"I did not know that was what he was going to do at that time."

And in speaking of Shaw, he said:

"He was clear down to the avenue the last time I saw him, *still going south.* I did not see

> him climb up at the end of the car at all. * * * Neither Corrigan nor Shaw, or anybody else, said anything to me about it (the coupler). I had no conversation with them at all." (Rec., 36.)

So it is clear that there was nothing in the usual manner of doing the work calculated to apprise King that it was Corrigan's intention to shove this train further down into the yard until after the broken knuckle had been replaced. King was not permitted to testify as to what he *supposed* Corrigan or Shaw were going south for, and, hence, the record is silent upon that point; but his conduct would indicate that he supposed they were going down there to look for a knuckle to replace the broken one, and he knowing there was one on the engine, naturally went to get it himself. If it was a fact that King knew that Corrigan, or Shaw, were not going in search of another knuckle, but, upon the contrary, that one of them was going down to line up the switches, and that Corrigan intended to run the train down in the yard without replacing the broken knuckle, and that fact would tend to convict King of contributory negligence, the burden was upon the company to prove it, for the law is, as stated in *W. St. L. & P. R. Co.* v. *C. U. T. Co.*, 23 Fed., 740:

> "In actions for injuries caused by negligence contributory fault is, in the federal courts, a matter of defense, of which the burden of proof is upon the defendant. (*Railroad Co.* v. *Gladmon*, 15 Wall., 401; *R. R. Co.* v. *Horst*, 93 U. S., 201; *Hough* v. *Ry. Co.*, 100 U. S., 213.) *And consequently reasonable presumptions and in-*

ferences in respect to matters not proved or left in doubt should be in favor of the injured party."

As we have seen, King's positive testimony is that he did not know that Corrigan was going down south for the purpose of lining up the switches, and it is a reasonable presumption, in view of the fact that it was customary to make such repairs where the cars stood when the defects were discovered, that he did not suppose this custom would be departed from. This is especially true, as the Act imposed upon Corrigan, as the representative of the company, *the absolute duty* of not hauling or using these cars until the broken knuckle was replaced, and in the absence of notice to the contrary, King had the right to assume that Corrigan would do his duty, and hence the cars would not be moved until the broken knuckle was replaced.

In 1 Shear. & Red. on Neg., 4th Ed., Sec. 92, the author lays down the rule as follows:

> "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence upon the part of the defendant. *He has a right to assume that every one else will obey the law,* including not only the common law *but also any statutes* or any ordinances, *and to act upon that belief."* (See to the same effect *Thomas* v. *Ry. Co.,* 8 Fed. Rep., 732; *C. C. Ry. Co.* v. *Fennimore,* 199 Ill., 9, and cases there cited.)

So it was an inference which the jury might fairly draw from the evidence that King supposed that Corrigan and Shaw, or one of them, had gone in search of another knuckle, and hence, that he, knowing where there was one, did the right and proper

thing, to go and get it and to undertake to replace the broken knuckle. King did not even know that the next movement of the train would be southward; they frequently switched cars from the north end of such trains; *they had just switched out two cars that way* and he did not know but that there were others to be switched out the same way, and which of course could not be *pulled* north until the broken knuckle was replaced. But it is said that King was negligent because, as is claimed, he did not notify the engineer that he was about to replace the broken knuckle. As a matter of fact, the evidence shows that he did so notify the engineer. The engineer was dead at the time of the trial and King's testimony was the only evidence upon that point. He testified that after he discovered the knuckle was broken and recalled that he had one upon the engine, that:

> "I went down for the knuckle. There were some loaded coal cars standing on the adjoining track west of these cars, and there was a track parallel with the track on which this train stood running around the curve in the same way. Between these coal cars and my cars I walked up to the engine. The knuckle was on the front end. I stepped up on the foot-board, reached across and pulled the knuckle across to me *and then reached my left hand up and waved it like that* (indicating) *and the engineer saw it and looked right at me. I took hold of the knuckle and held it up and motioned like that* (indicating). *It was about 12 or 14 feet from the engineer's window to the front end of the engine where I stood at the time.* I never measured the distance. The engineer was on the west side of the engine which is his side. I *then* went

down to the opening with the knuckle. I took the old piece out and took the old knuckle out and put the new knuckle in, and *just* as I reached around my hand to grab up the pin to drop in there my hand was caught. The car north of me came against me. The knuckle I was repairing was on the north end of the south car at the opening." (R., 25, 26.)

And on cross examination he said:

"I knew that I had one on the front end of the engine. I walked up on the west side of the train, to the engineer, to the front end of the engine rather, and took the knuckle from across. I had the knuckle there *for about a day.* I had picked it up alongside of the track. I also had a Janney knuckle on there. * * * I had no talk with anybody as I took this knuckle off. The engine pump was working making lots of noise and there was a stock train pulling out and quite a noise there. The stock train was pulling out of Chute No. 10. That was east and north of me about seven or eight rods. During the time I climbed down and examined this knuckle and walked up through that space it would probably take three minutes. Then I took the knuckle off and started towards this place and that took about *three minutes* more." (R., 36. 37.)

The record in this case was prepared during the absence of the attorneys who tried the case for the respective parties, and, consequently, the record, as we have seen, simply uses the word "indicating" instead of describing the motions made by King to the engineer. But the bill of exceptions is the company's pleading and must be taken most strongly against it, as all the presumptions are in favor of the verdict. In 3 Ency. of Plead. & Prac., 509, it is said:

> "A bill of exceptions is substantially a pleading of the exceptant before the Appellate Court; he is, therefore, *responsible for all deficiencies therein;* and where the bill is unintelligible, confused, or conflicting, *it will be interpreted against the appellant and in support of the judgment.*" (Citing the following, among other cases: *Ensminger* v. *Powers*, 108 U. S., 301; *Bingham* v. *Cabbott*, 3 Dall. (U. S.), 38; *Hanna* v. *Maas*, 122 U. S., 24; *Suydam* v. *Williamson*, 20 How., 427.)

In view of this rule of law, and the rule that the burden is upon the defendant to *affirmatively* show contributory negligence, the construction most favorable to King must be placed upon the record in this regard, namely, that the *motions* which King described in the presence of the court and jury as having been made by him to the engineer *were of such a character as to inform the engineer that he, King, was taking the knuckle down alongside of the train to insert it in the place of a broken knuckle.* In fact, without any reference to the inferences or presumptions spoken of, what the record *does show* in this regard was sufficient to warrant the jury in finding that King did, by his conduct and signals, inform the engineer that he was taking the knuckle down for that purpose as clearly as though he had told him by word of mouth, for as we have seen it shows that he walked north to the engine and that the engineer and he were upon the same side of the engine and about 12 or 14 feet apart, that he (King)

> "stepped upon the foot-board right across and pulled the knuckle across to me and then reached my left hand up and waved it like that (indicating) and the engineer saw it and looked

> right at me. I took hold of the knuckle *and held it up and motioned like that* (indicating). * * * I *then* went down to the opening with the knuckle."

As the engineer saw King and was looking right at him when he thus held the knuckle up and motioned (no doubt in the direction of the opening) and then started down toward the opening with the knuckle, the engineer could not have failed to understand why he came up for the knuckle, and why he was taking it down alongside the train. That the engineer was thus informed that King was going down between the cars to replace a broken knuckle is shown by the fact that the engineer whistled at the instant he started the train (R., 26), for the evidence shows that as a general rule the engineer only blew the whistle when he had reason to believe that someone might be between the cars or there was some special danger.

Conductor Corrigan testified:

> "When they are operating the train on those tracks; as it was standing still and I wanted to start it over the street crossing, *there was no custom that I know of about giving any signal before starting the train.* (R., 51.) *The special occasions* upon which it does give the signal by a *whistle* is to answer a signal *and to give a warning.* * * * When it is thought there is something out of the way *and that some special warning is required,* the whistle is given *in some cases.*" (R., 52.)

The fact that the whistle was blown is additional evidence, if any was needed, that the engineer knew that King was going between the cars to replace a broken knuckle. In this connection it may be ob-

served that as King thus informed the engineer by his conduct and signals that he was going between the cars to replace a broken knuckle, and as the train could not move until the engineer started it, it is immaterial whether he should have anticipated that Corrigan had gone down to line up the switches, and that it was Corrigan's intention to back the train further down into the yard before replacing the knuckle; for, in the circumstances, he might reasonably suppose that the engineer would wait until he got from between the cars before moving the train in answer to a signal from Corrigan, if one should be given. This is especially true, as he might reasonably suppose that Corrigan *would expect him to replace the knuckle if it was in his power to do so.* It was a very negligent thing for the engineer to start the train until he received a signal from King or some one else indicating that King had replaced the knuckle and was out from between the cars, and King was not required by law, and of course did not anticipate that he would do so. In *So. Pac. Ry. Co.* v. *Allen,* 48 Tex. Civ. App., 66; 106 S. W. Rep., 442, owing to the defective condition of the coupler, a brakeman was required to go between the cars to make the coupling. Before going between the cars he signalled the engineer to stand still. And in its opinion the court said:

> "Nor can it be said as a matter of law that plaintiff was guilty of contributory negligence in placing his arm between the buffers when the engine was attached to the cars, as is contended by this assignment. The plaintiff had no reason to think that the engine was liable to move the cars at any moment. On the con-

trary, he had the right to assume, and act upon the assumption, that his signal not to move the cars while he was between them would be obeyed by the engineer."

That the whistle was not sounded in time to permit King to get from between the cars is clear from the evidence. King testified:

> "I heard the blast of the whistle almost at the same time I was caught." (R., 26, 37.)

The fireman testified:

> "The whistle and the starting of the train happened *about the same time.* The whistle and the movement came about the same time, but the whistle came first." (R., 47.)

Corrigan testified:

> "I was some distance south at that time. I do not know exactly when it was with reference to the time I saw the train moving." (R., 51.)

We respectfully submit that under all the evidence the question of contributory negligence was a question for the jury.

III.

THERE WAS NO ERROR IN THE PORTIONS OF THE COURT'S CHARGE TO THE JURY COMPLAINED OF.

First.

Complaint is first made of the court's refusal to give the following instruction:

> "In deciding whether the plaintiff was in the exercise of reasonable care, you should take into consideration all of the evidence on that subject, including that respecting the rule of the defendant which forbade the making of repairs upon the main tracks of the defendant's

railroad without setting a signal of some sort to give warning to train crews not to move engines or trains into where the repairs were being made. And if you believe that a reasonably prudent man, knowing this rule and the other surrounding circumstances shown by the evidence, would not have gone between the cars, then the plaintiff cannot recover."

Upon the question of contributory negligence the court, in its charge, among other things, said (R., 74):

"The plaintiff cannot recover in this case if the evidence shows that he was not at the time of the happening of the accident to him and in his movements immediately preceding same and connected with it, in the exercise of ordinary care for his own safety. By ordinary care is meant the degree of care which a reasonably prudent man, under like circumstances and conditions, would exercise for his safety. If you believe from the evidence that the plaintiff was reckless or careless of his own safety in going between the cars at the time when he was injured, just before the accident, and that his course was such as would not have been adopted by a reasonably careful man, then the plaintiff cannot recover. If you believe from the evidence in this case that the plaintiff knew that a movement of the train was likely to be made south and that he knew that two whistles of the engine meant that the train was to be put in motion, and that the engineer gave two whistles of the engine before starting the engine in motion in time to have enabled the plaintiff, by the exercise of ordinary care on his part for his own safety, to have stepped from between the cars before the cars came together, then the plaintiff cannot recover in this case. The burden of proof does not rest upon the plaintiff to show that he was in the exercise of ordinary

> care; but the burden in this regard is upon the defendant to prove that the plaintiff was not in the exercise of ordinary care. In determining whether or not the plaintiff exercised ordinary care, you will consider his testimony as to what he did in connection with the testimony of all other witnesses in the case, on both sides, relating to that subject. While the burden is upon the defendant to prove that at the time of the injury the plaintiff was not in the exercise of ordinary care for his own safety, yet in determining whether or not he did exercise such care, you will take into consideration *all the evidence introduced in the case by both parties bearing upon that subject.*" (R., 74, 75.)

We submit that the charge was unusually full and explicit upon this question. The only testimony in reference to the rule mentioned in the refused instructions was as follows: King testified:

> "I knew it was a rule of the company that *repairs to cars* could not be made on the main track without setting signals. (R., 38.)
>
> "Q. What signals did you ever see set out on this track when any little alterations were necessary on the coupler? A. I never set out no flags. (There was no evidence that any one else ever used flags on such occasions.)
>
> "Q. What were the conditions, if any, when flags were ever used? A. Whenever they set out a flag, that meant for the switching crew to be careful and not shove any car *over that flag.* There might be danger *down at the other side of it.*" (R., 39.)

This was *all* the testimony in the case on that subject. The instruction assumes that the track in question was a *main* track within the meaning of the rule referred to, whereas, although it was called a main track, it was in reality a *storage or delivery*

track, which was used for the placing and storage of cars until Corrigan's crew took them away. (R., 53.) It also assumes that the rule was applicable to a case like the one in question, although there was no evidence tending to show that it was applicable to such a case, and a little reflection will show that it was not. Flags are used on main tracks to give notice to *other crews* that men are liable to be under or about the cars or train thus protected by the flags, but in the case at bar Corrigan's crew was the only crew working upon those tracks, or in that district (R., 57), and, hence, there was no danger of any other train striking the cars. If plaintiff had set out flags to protect this train while he was replacing the broken knuckle, he would have had to place one flag north of the engine and the other south of the south end of the train. Under the circumstances the engineer could not see the south flag and the north flag would be both meaningless and useless, for the engineer did not intend to and did not move the train northward. As we have seen, King notified the engineer by both his conduct and signals that he intended to replace a broken knuckle, and that was all a man would ordinarily do under such circumstances. If another train had run into the standing train and King was thus injured, there might be a question as to whether he should or should not have set out a flag, but the accident did not happen in that manner, and, hence, even if the tracks in question were main tracks, and the rule in question was applicable thereto, the rule or its violation had no reference to this kind of a case. Negligence, in order to bar a recovery, must be a proxi-

mate cause of the injury (*Looney* v. *M. R. Co.*, 200 U. S., 480; *C. C. Co.* v. *Bokamp*, 181 Ill., 18; *St. L. N. S. Y. Co.* v. *Godfrey*, 198 Ill., 288; *N. C. St. R. Co.* v. *Eldridge*, 151 Ill., 546), yet this requested instruction, if given, would have informed the jury that if King was negligent in not setting out a flag he could not recover, notwithstanding such negligence upon his part was neither the proximate or even the remote cause of his injury. The instruction should not have *assumed* that the track in question was a main track and that the rule in question was applicable thereto, and that its non-observance *contributed* to the accident. When the jury were informed as they were by the court's charge that they should consider all the evidence in the case relating to the subject of contributory negligence the ground was fully covered, and under that charge, if they regarded the track as a main track, to which the rule was applicable, and that the rule was applicable to a situation like that, shown by the evidence, and that its violation contributed to the accident, they had a right to take these facts into consideration in determining the question of King's care. It would also have been improper for the court to have thus singled out and thereby have given undue prominence to this rule, without at the same time having submitted to the jury the question as to whether it was applicable to the place and situation and without calling attention to King's evidence that he never set out flags in such a case.

Second.

Complaint is next made of the following portion of the trial court's charge, as quoted in plaintiff in error's argument:

> "If his (the plaintiff's) injury was the result of the defendant's failure to obey this law of Congress *and also* the negligence of a fellow-servant of plaintiff, the plaintiff is entitled to recover in this case."

The complaint in this regard seems to be, that if the engineer was negligent in any respect, the court erred in submitting to the jury the question as to whether defendant's negligence in using the car with the defective coupler may not also have been a concurring, or contributing, cause of the accident; their position being that if the engineer was negligent at all the court should have held *as a matter of law* that his negligence was the *sole* proximate cause of the injury.

This portion of the charge, *as actually given* to the jury (and which will be shown in brackets), together with other portions of the charge upon the same subject, was as follows:

> "Before the plaintiff can recover in this case it must be established by a preponderance of the evidence that his injury for the sustaining of which he brings this action, *was caused by the defendant's failure to obey the Act of Congress.* * * * If it appears in this case that this injury resulted *solely from the negligent act of a fellow-servant,* disassociated entirely from the defendant's failure, if failure there was, to obey this law of Congress, the plaintiff cannot recover. [If his injury was the result of the defendant's failure to obey this law of

> Congress *and also* the negligence of a fellow-servant in this case]: and on the evidence in this case the court charges you that Corrigan * * * was not a fellow-servant of this plaintiff in respect of the question of *determining* whether or not the car with the defective coupler should be repaired or not before it was moved." (R., 73.)

It will be noted that the portion of the charge complained of is incorrectly quoted by counsel, as the concluding words quoted, "the plaintiff is entitled to recover in this case," were not in the court's charge as given; the court inadvertently failed to finish the sentence or paragraph.

It will also be noted that the court did instruct the jury that,

> "If it appears in this case that the injury resulted *solely from the negligent act of a fellow-servant,* disassociated entirely from the defendant's failure, if failure there was, to obey this law of Congress, the plaintiff cannot recover."

In this portion of the charge, *and it was not excepted to,* the question was submitted to the jury as to whether the engineer's negligence, if any, was, or was not, the sole cause of the injury. Indeed, defendant's counsel expressly requested the court to submit this question to the jury, for they asked the court to instruct if the plaintiff was injured because of any negligent act of the engineer. * * * *And such negligent act was the sole moving cause of the injury plaintiff cannot recover."* (R., 77.) See also other requested instructions. (R., 76, 77.) The portion of the charge complained of, as actually given, was simply "if his injury was the result of the defendant's failure to obey this law of Congress,

and also the negligence of a fellow-servant in this case;" which was meaningless. Assuming, for sake of argument, however, that it read as quoted by counsel, as above stated their objection to it appears to be, not that it did not state a correct rule of law, but that "it was not applicable to the facts," for the reason that if the engineer knew that King was going between the cars, his conduct in moving them before King was out of danger "was the sole moving cause of the injury." Their complaint is apparently based upon the assumption that if the engineer was negligent in any respect, then his negligence should have been declared *as a matter of law* to be the sole proximate cause of the injury, and that it was therefore error to submit the question to the jury as one of fact, as to whether his negligence, if any, was the sole proximate cause; yet, as we have seen, the court did submit this question to the jury in a portion of its charge not objected to, and that counsel also actually requested it to submit this question to the jury, and, hence, they are not in a position to complain that the question was submitted to the jury instead of being held as a matter of law. Even if plaintiff in error was in a position to complain of the submission of this question, its position is clearly untenable. What is the proximate cause of an injury is ordinarily a question of fact for the jury. (*C. M. & St. P. Ry. Co.* v. *Kellogg*, 94 U. S., 469.) And it seems almost absurd to claim that if the engineer was negligent in any respect, that it follows that his negligence was, *as a matter of law*, the sole proximate cause of the injury. Counsel argues

the proposition as though if the engineer was negligent at all, it was in starting the train *when he knew* that King was between the cars. As a matter of fact, he may have been negligent *in failing to know, or anticipate,* that King's conduct and signal indicated that he was going between the cars; or he may have been negligent in taking it for granted, as was probably the case, that King had replaced the knuckle, and was out of danger, when he started the train; or he may have been negligent in failing to blow the whistle in sufficient time, prior to starting the train. It is certain that the engineer would not have started the train had the conductor not signalled him to do so, and it is equally clear that plaintiff would not have been injured by the starting of the train if he had not been between the cars replacing the broken knuckle. There are certainly theories which are sustained by the evidence, which would not require the court to hold, as a matter of law, that the engineer's negligence, if any, was the sole proximate cause of the injury. Indeed, there is no view of the case, under which the engineer's negligence could be properly held to be more than a concurring or contributing cause of the accident.

The law is well settled that a servant may recover for an accident caused by the combined negligence of the master and his fellow-servant. *Monmouth M. & M. Co.* v. *Erling,* 148 Ill., 533; *C. M. & St. P. Ry. Co.* v. *Ross,* 112 U. S., 377; 28 L. Ed., 787. In the latter case, in speaking of an injury occasioned by the negligence of a fellow-servant, the court said:

> "It is indispensable to the employer's exemption from liability to his servant, for the conse-

quences of risks thus incurred, *that he should himself be free from negligence.* He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect and an injury result, he is liable to the servant as he would be to a stranger. *In other words: whilst claiming such exemption, he must not himself be guilty of contributory negligence.*"

In the case of *So. Pac. Co.* v. *Allen,* 48 Tex. Civ. App., 66; 106 S. W. Rep., 443, which was a case where a brakeman signalled the engineer to hold the train at a standstill while he went between the cars in an effort to adjust a defective coupler so that the cars could be coupled or uncoupled, and it was there claimed that the engineer's negligence in starting the train while the brakeman was thus between the cars was the proximate cause of the brakeman's injury, and as the engineer and brakeman were fellow-servants, there could be no recovery. In answer to this contention the court, at page 447, said:

"If, then, the cars were not sufficiently equipped with automatic couplers in accordance with the Act of Congress, as was found by the jury, it is a logical sequence that plaintiff's injury, though caused by the negligence of a fellow-servant, was from a risk which, as a matter of law, he did not assume. As before intimated, the purpose of the Safety Appliance Act is to relieve the employe of the danger of going between the ends of cars to couple or uncouple them. If they are not moving when he goes between them, nor moved while he is there, no danger is incurred by him. The danger is from their movement, which is necessary to couple them by impact, and oftentimes required to uncouple them. It is always an employe other

than the one who is between the cars who moves them. If in doing so he is negligent, and such negligence relieves his employer from his negligence in failing to comply with the Act of Congress, and visits the consequence of the negligence of both upon the employe whom the act was intended to protect, then such legislation is as worthless as 'the stuff that dreams are made of.' (See *Schlemmer* v. *Ry. Co.*, 205 U. S., 8; 27 Sup. Ct., 407; 51 L. Ed., 682.) Even at common law, where the harsh fellow-servant doctrine applies with undiminished rigor, the consequence of a servant's negligence in causing an injury to another servant does not absolve the master from his liability for its consequences. In this case the most that can be said of the negligence of plaintiff's fellow-servants is that it simply concurs with that of the defendant in causing the injury to plaintiff."

To the same effect see *Voelker* v. *C. M. & St. P. Ry. Co.*, 116 Fed., 867; 4 R. R. Rep., 509. This question is fully and ably discussed in both the *Allen* and *Voelker* cases and we especially request the court to read those cases.

The act of the engineer in starting the train under the circumstances was in no sense an independent efficient cause sufficient to break the casual connection between the conductor's act and the injury. Upon the contrary, the engineer's act was the direct result and consequence of the conductor's act, for he simply obeyed the signal which the conductor gave him through Shaw to start the train. We request the affirmance of the judgment.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

CHICAGO JUNCTION RAILWAY COMPANY *v.* KING.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 34. Argued November 2, 3, 1911.—Decided December 11, 1911.

The repugnancy of the Safety Appliance Law to the Constitution is not now open to controversy; it has been held constitutional. *Southern Railway Co.* v. *United States*, *ante*, p. 20.

Where the constitutional question is not advanced by the defendant until the trial it does not give jurisdiction of an appeal to this court from the Circuit Court of Appeals. *Macfadden* v. *United States*, 213 U. S. 288.

Where the cause of action is based on a statute of the United States there is an appeal to this court from the judgment of the Circuit Court of Appeals.

Although there may be jurisdiction because the cause of action rests on a statute of the United States, where none of the contentions directly invoke the interpretation of the statute, but merely the question whether, on the evidence, there was a right of recovery, the case is of the character of cases in which it was the purpose of the Judiciary Act of 1891 to make the judgment of the Circuit Court of Appeals final, and this court will only examine the record to see if plain error has been committed; and if that is not apparent, it will, as in this case, affirm the judgment.

169 Fed. Rep. 372, affirmed.

THE facts are stated in the opinion.

Mr. John D. Black, with whom *Mr. John Barton Payne* was on the brief, for plaintiff in error.

Mr. James C. McShane, for defendant in error, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This action to recover for personal injuries begun in a

state court, was removed to a Circuit Court and there decided for the plaintiff. To obtain a reversal of a judgment affirming, the case is here upon an assumption that a constitutional question is involved which gives jurisdiction. It is admitted that such question, that is, the repugnancy of the Safety Appliance Law to the Constitution, is now not open to controversy because of a recent decision. *Southern Railway Co.* v. *United States*, *ante*, p. 20. Yet, as the case is here, other errors relied upon, it is urged, must be decided. But even conceding that the constitutional question was not wholly frivolous when first advanced, as it arose only at the trial, it does not give jurisdiction. *Macfadden* v. *United States*, 213 U. S. 288. But this is negligible, since by the pleadings the cause of action was based on a statute of the United States—the Safety Appliance Law—which gives jurisdiction. *Macfadden* v. *United States*, *supra*. The damage thus arose: After cutting out some cars from an interstate freight train at the Union Stock Yards in Chicago, the train could not be re-coupled because of a broken knuckle on the coupler of one of the cars. The plaintiff, a switchman, secured a new knuckle and going between the cars to put it in place of the broken one, was crushed by a backward movement of the train, which brought the uncoupled cars together. The movement was ordered by the train conductor with the purpose of shoving the train back several city blocks to where it was proposed to repair the coupler.

Coming to consider the contentions, although they seemingly involve many propositions, they all are reducible to the assertion that the plaintiff was so clearly guilty of contributory negligence, in one aspect or the other, that it was the duty of the court to instruct a verdict for the defendant. Indeed, this is expressly stated in the argument to be the result of all the propositions except two relating to an instruction given and to one refused. But these

two instructions when rightly considered are of the same character, as they also rest ultimately upon the contention that the proof on particular subjects was such as to necessitate a binding instruction for the railway company.

The following, therefore, as to all the contentions, is clearly apparent: First. That while they may in a general sense involve the Safety Appliance Law, none of them directly invoked the interpretation of that law. Second. That while the contentions, from an ultimate point of view, present a question of law—that is, was there any substantial evidence to go to the jury?—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. Third. That although we have jurisdiction to review because the cause of action as stated in the pleadings rested upon the Safety Appliance Law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals.

Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof. We are of this opinion because, in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the court below in any of the particulars complained of. In the discharge of such duty in this case, in view of the full opinion of the Circuit Court of Appeals, and in the light of the adequate examination which we have made of the

record, as we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below, it follows that the judgment of the Circuit Court of Appeals must be and it is affirmed.

Affirmed.